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THE

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TABLE OF REPORTED CASES.

A

Alabama & Chattanooga R. R. Co. v. Jones 97
Alden v. Boston, Hartford & Erie R. R. Co 230
Arnold, Swope et al. v 148

B

Baldwin v. Rapplee 19
Bank of Louisiana, Thornhill et al. and Williams v 367, 377
Barstow v. Peckham et al 72
Bean v. Laflin 333
Beers et al 211
Bernart, Rasch &, Taylor v 399
Bickford, Smith & 20
Bingham et al., Sherman et al. v. 34
Bininger, Clark & 255
Blandin 39
Blodget & Sanford 472
Booth, Lenke v 351
Borden & Geary 128
Boston, Hartford & Erie R. R. Co., Alden v 230
Boston, Hartford & Erie R. R. Co 232, 233
Boston, Hartford & Erie R. R. Co. et al., Sweatt v 234
Boyd 199
Brady's Bend Iron Co., M. & M. National Bank of Pittsburgh v. 491
Brick Co., Massachusetts 408
Brombey v. Smith et al 152
Bucyrus Machine Co 303
Bunster 82
Burton et al., Samson v 459

C

Carson 290
Case v. Phelps et al 452
Chattanooga R. R. Co., Alabama and, v. Jones 97
Cheney, Knight v 305
City Bank of St. Paul, Wilson v. 270
Clark & Bininger 255
Cole et al., Scammon v 257
Comstock & Young 191
Cookinham v. Morgan et al 16
Corbin, Post v 11
Coulter 64
Cox v. Wilder et al 443
Crane, Harvey v 218
Crawford 301
Cretiew 423
Culvers, Penn & 288

D

Darby's Trustees v. Lucas 437
Dewey et al., State of North Carolina v. Trustees of University and 466

E

Ellerhorst & Co 144
Erie R. R. Co., Boston, Hartford and, Alden v 230
Erie R. R. Co., Boston, Hartford and 232, 233
Erie R. R. Co. et al, Boston, Hartford and, Sweatt v 234

F

Farrell..... 125
Forsyth v. Woods..... 78
Frank..... 194
Frizelle, S. F. & C. S..... 119
Frizelle, S. F..... 122

G

Gallison et al..... 353
Geary, Borden &..... 128
Glidden et al., Merritt v..... 157
Golson et al. v. Neihoff et al..... 56
Graham..... 155
Graves, Lawrence v..... 279

H

Hall v. Wager & Fales..... 181
Hanna..... 292
Harmer, Peiper v..... 252
Harvey v. Crane..... 218
Haskell v. Ingalls..... 205
Heller..... 46
Hester..... 285
Hoguet et al., Kohlsaat v..... 159
Hood et al. v. Karper et al..... 358
Hornell, Hunt &..... 433
Hotchkiss, Maltbie v..... 485
Howard et al., Masterson v..... 130
Hunt..... 493
Hunt & Hornell..... 433
Hunt, McGrath &..... 254
Hunt, Tillinghast & Co. v. Pooke & Steere..... 161

I

Ingalls, Haskell v..... 205

J

Jones, Alabama & Chattanooga R. R. Co. v..... 97

K

Karper et al., Hood et al. v..... 358
Karr v. Whittaker..... 123
Keating v. Keefer..... 133
Keefer, Keating v..... 133
Knight v. Cheney..... 305
Kohlsaat v. Hoguet et al..... 159
Krogman..... 116
Krueger et al..... 439

L

Laflin, Bean v..... 333
Lathrop et al..... 43
Lawrence v. Graves..... 279
Leighton..... 95
Leland, W. & C..... 222
Lenke v. Booth..... 351
Lord..... 318
Lucas, Darby's Trustees v..... 437

M

Machine Co., Bucyrus..... 303
Maltbie v. Hotchkiss..... 485
Marshall, (ex p.), Trim..... 23
Massachusetts Brick Co..... 408
Masterson v. Howard et al..... 130
McGrath & Hunt..... 254
Merritt v. Glidden et al..... 157
Millward, Sedgwick v..... 347
Morgan et al., Cookinham v..... 16
Morgan et al. v. Thornhill et al.. 1
M. & M. National Bank of Pittsburgh v. Brady's Iron Co..... 491

N

National Bank, M. & M., of Pittsburgh v. Brady's Bend Iron Co. 491
Neihoff et al., Golson et al. v.... 56
North Carolina, State of, v. Trustees of University and C. Dewey et al..... 466

O

Overton..... 366

P

Peckham et al., Barstow v..... 72
Peiper v. Harmer..... 252
Penn et al..... 30
Penn & Culvers..... 288
Phelps et al., Case v..... 452
Place et al., Sedgwick v..... 168
Pooke & Steere, Hunt, Tillinghast & Co. v..... 161
Post v. Corbin..... 11
Preston..... 293
Purcell et al. v. Wagner et al.... 23

R

Rapplee, Baldwin v..... 19
Rainsford..... 381
Rasch & Bernart, Taylor v..... 399

S

Samson v. Burton et al..... 459
Sanford, Blodget &..... 472
Sanger & Scott..... 54

Sawyer et al. v. Turpin et al.... 339
Scammon v. Cole et al..... 257
Schenck..... 93
Scott, Sanger & 54
Sedgwick v. Millward..... 347
Sedgwick v. Place et al 168
Sherman et al. v. Bingham et al.. 34
Skelly..... 214
Smith & Bickford..... 20
Smith et al., Brombey v..... 152
State of North Carolina v. Trustees of University and C. Dewey et al. 466
Stevens, R. 112
Stevens, W. S..... 298
Sweatt v. Boston, Hartford & Erie R. R. Co. et al..... 234
Swope et al. v. Arnold..... 148

T

Taylor v. Rasch & Bernart..... 399
Tenth National Bank, Warren and Rowe v..... 479
The State of North Carolina v. Trustees of University and C. Dewey et al..... 466
Thornhill et al. and Williams v. Bank of Louisiana.....367, 377
Thornhill et al., Morgan et al. v.. 1
Trim ex p. Marshall 23
Trustees of University and C. Dewey et al., State of North Carolina v..... 466
Turpin et al., Sawyer et al. v... 339

U

University and C. Dewey et al., State of North Carolina v. Trustees of..... 466

V

Vogel 393

W

Wager & Fales, Hall v..... 181
Wagner et al., Purcell et al. v.... 23
Warner et al.... 414
Warren and Rowe v. Tenth National Bank et al..... 479
Warshing, J. & S..... 350
Welch..... 348
Whittaker, Karr v..... 123
Wilder et al., Cox v..... 443
Williams, Thornhill et al. and, v. Bank of Louisiana.....367, 377
Wilson v. City Bank of St. Paul. 270
Wood..... 421
Woods, Forsyth v..... 78

Y

Young, Comstock & 191

TABLE OF CASES CITED.

A

Abbe, 2 N. B. R. 26..... 229
Adam, 2 Rose. 36..... 147
Adams, 36 How. 51 52
Adams, 3 N. B. R. 139..... 389
Adams, 2 N. B. R. 92...120, 396, 397
Adams v. Boston, Hartford & Erie R. R. Co., 4 N. B. R. 99...104, 251
Adams Bank v. Rice, 2 Allen, 480.....115, 442
Alabama & Chattanooga R. R. Co. v. Jones, 5 N. B. R. 97..... 244
Alexander, 3 N. B. R. 6..77, 239, 314
American Bank v. Baker, 4 Met. 164 412
Angel & Ames on Corporation, sec. 31..... 241
Appold, 1 N. B. R. 178..... 26
Archbold's Civil Pleadings, 59... 131
Arnold v. Maynard, 5 Law Rep. 288 344
Austin v. Alderman, 7 Wall. 699. 249
Ayer v. Brastow, 5 Boston Law Rep. 498..... 229
1 Alky. 110..... 147
8 Anne. C. 14, P. Laws, 97..... 24
1 Atk. Ch. R. 126..... 15

B

Babcock, 3 Story R. 399..... 147
Babcock v. Eckler, 24 N. Y. 623..... 169
Bagnalstown & Wexford Railway Co., 15 Irish Ch. R. 491..... 246
Ballou, 3 N. B. R. 177..... 77
Bamford v. Baron, 2 T. R. 594, n. 512
Bank of Leavenworth v. Hunt, 4 N. B. R. 198.....344, 346
Bank of Scotland, 2 Rose, 197... 147
Bank of U. S. v. Houseman, 6 Paige, 526..... 169
Bankrupt Act, sec. 3..... 67
" " 7.....67, 387
" " 8..... 67
" " 11..... 227
" " 14....67, 220, 228
" " 29...387, 388, 425
" " 32..... 227
" " 33.....82, 89, 93
" " 35..... 360
" " 36 224
" " 39.105, 360, 435, 489
Barber, De Gex, B. R. 381..... 246
Barnard v. Crosby, 6 Allen, 327.. 186
Beal, 2 N. B. R. 178..... 229
Beals v. Clark, 13 Gray, 21..... 186
Bean v. Brookmire, 4 N. B. R. 57..... 221
Beardsley v. Stover, 7 How. 294.. 47
Beatty v. Gardner, 4 N. B. R. 106..... 209, 210, 333, 384
Beatty v. Knowler, 4 Pet. 152... 105
Benson v. Ela, 35 N. H. 463, 410. 407
Bigelow, 1 N. B. R. 186..... 122
Bigelow, 2 N. B. R. 170..... 41
Bininger, 3 N. B. R. 100..... 384
Bissell v. Jeffersonville, 24 How. 287..... 241
Black & Secor, 1 N. B. R. 81.... 159, 208, 331, 333
Black v. Nease, 37 Penn. 438.... 459
Blair v. Harrison, 11 Ill. 483.... 451
Blauvelt v. Woodruff, 31 N. Y. 287..... 70
Blodgett v. Hildreth, 11 Cush. 311..... 342
Bonesteel, 3 N. B. R. 127.....77, 315

Bonaparte v. Railroad, Bald. C. C. 222 241
Booth v. Barnum, 9 Conn. 286... 263
Bradford v. Rice, 102 Mass. 472.. 354
Brady v. Mayor of New York, 20 N. Y. 312 105
Broadhead, 2 N. B. R. R. 93.... 389
Brock v. Hoppock, 2 N. B. R. 2.. 216
Brooks' Abridgement 131
Brown, 3 N. B. R. 145 354
Brown v. Leonard, 2 Chitty, 120.. 441
Brown v. Maryland, 12 Wheat. 445 ..... 247, 248
Buck v. Gooch, 1 Holt. 13 412
Buckingham v. McLean, 13 How. 351 330
Buffington v. Day, 11 Wall. 113.. 247
Bump on Bankruptcy....52, 389, 492
Burgess, 3 N. B. R. 47 415
Burnham v. Windsor, 5 Law Rep. 507 343
57 Barb. 625 387
57 Barb. 249 388
2 Brightley's Digest, 204 153

C

Caldwell v. City of Alton, 33 Ill. 416 106
Campbell v. Campbell et al..... 139
Carpenter v. Roe, 10 N.Y. 227.169, 459
Carl v. Brown, 2 Mich. 401 302
Carr v. Hilton, 1 Curt. C. C. 390. 263
Cary v. Curtis, 3 How. 245..... 470
Case v. Phelps, 39 N. Y. 164.... 180
Castle v. Palmer, 6 Allen, 401... 451
Caswell v. Williams, 12 Ill. 390.. 451
Caton v. Rideout, 1 McN. & G. 599 41
Cawkwell, 19 Ves. 233 412
Chandler, 4 N. B. R. 66 116
Chapman v. Forsyth, 2 How. 202. 351, 352
Chapman v. Webb, 1 Code Rep. U. S. 388 47
Christy, 3 How. 317 316
Church v. Rowling, 3 N. Y. 216.. 354, 355
City Council of Montgomery v. Plank Road Co., 31 Ala 76.... 105
Citizens' Bank of Louisiana v. Levee Steam Cotton Press Co., 7 Annual Rep. 288 371
Clark, 3 N. B. R. 3 87
Clark, assignee v. Rosender et al., 5 Rob. La. Rep. 33 373
Clark's Exexutors v. Van Reimsdyk, 9 Cranch, 160 264
Clements v. Moore, 6 Wall. 299.. 407
Clinton Bridge, 10 Wall. 462.... 247
Cohen v. Virginia, 6 Wheat. 392.. 468, 469
Colburn v. Proctor et al., 15 Gray, 38... 263
Collier on Partnership 229. 406
Commercial Bank v. W. W. Villavaso, 6 Annual La. Rep. 542. 375
Commonwealth v. Erie & Northeastern R. R. Co., 27 Pa. State 399 106
Commonwealth v. O'Hara, N. B. R. Sup. xix 88
Conner v. Miller et al. 1 N. B. R. 98 88
Cooker v. Cooker, 46 Me. 250, 407
Craft, 1 N. B. R. 89 331
Crawford, 3 N. B. R. 171..... 354
Crocker v. Crocker, 31 N. Y. 507. 455
2 Caine's cases in Error, 57..... 15
1 C. E. Green, 150, 161..... 71
3 Comp. Laws Mich. sec. 3292,966. 136
4 Cowen, 727 15
2 Cranch. 166 106
b Cush. 613 114

D

Dagurre v. Orsen, 3 Abb. 86..... 47
Daniel v. Mitchell et al., 1 Story, 188 264
Darby's trustees v. Boatmans' Saving Institution, 4 N. B. R. 197 66
Darkin v. Darkin, 17 Beav. 578.. 41
Dart. Coll. v. Woodward, 4 Wheat. 669 .....242, 250
Davis v. Carpenter, 2 N. B. R. 125 122
Davis v. Ransom, 18 Ill. R. 396.. 219
Davidson, 3 N. B. R. 106....208, 436
Delano v. Winsor et al. 1 Cliff. 505 264
De Laslet, 1 Rose 10..... 147
Denny v. Dana, 2 Cush. 172.... 186, 342
Dewdney, 15 Ves. 498..... .. 42
Dey, 3 N. B. R. 81.....70, 71
Dibblee, 2 N. B. R. 185..... 87
Dobbins v. Commissioners, 16 Pet. 447 248
Donath v. Brownhead, 7 Barr, 301 343
Dorville v. City Bank, 9 Rob. 366. 372
Downer v. Boweill, 26 Vt. 397... 354
Dresser v. Brooks, 3 Barb. 429.. 354, 355, 356
Duguild v. Edwards, 50 Barb. 288 352
Durgin v. Coolidge, 3 Allen, 544.. 115
Dyer, 6 Ves. 9 147

E

Easterbrook v. Messersmith, 18 Wis. 445..... 407
Eaton v. Shaw, 17 Vt. 641..... 405
Edwards v. Stephens, 3 Allen, 315..... 40
Eidom, 3 N. B. R. 39..... 7
Ellis, 1 N. B. R. 154..... 301
Eng. Law Rep, 5 Ch. App. 538.. 173
Erie Railway v. State, 31 N. J. 531..... 247

F

Faxon v. Baxter, 11 Cush. 35.... 354
Feise v. Wray, 3 E. 94..... 343
Fellows v. Wyman, 33 N. H. 351, 358..... 407
Fenner v. Tayloy, 1 Sim. 169.... 40
Ferson v. Monroe, 43 N. H. 144. 407
Fisher v. Foss, 30 Me. 459..... 354
Fitch v. Harrington, 13 Gray, 468..... 442
Fitch v. Magie, 2 N. B. R. 104.. 209
Fleck v. Charron, 29 Md. 318.... 407
Forbes v. Howe, 102 Mass. 427.. 342
Foster, 2 N. B. R. 81..... 415
Foster v. Heirs of Stone, 20 Pick. 542.....65, 70
Fox v. Woodruff, 9 Barb. 498.... 354
Frazer v. Western, 1 Barb. Ch. R. 220..... 169
Frear, 1 N. B. R. 201..... 113
Frederick, 3 N. B. R. 117..... 156
Freeman, 4 N. B. R. 117..... 430
Freeman v. Pope, Eng. L. R. Eq. 206.....171, 172

G

Gale v. Babcock, 4 Wash. C. C. R. 199.....468, 470
Gardner v. Baker, 25 Iowa, 347.. 451
Gardner v. Gardner, 1 Giff. 126.. 41
Gay, 2 N. B. R. 114..... 415
Gayer v. Wilkinson, 1 Bruce, 50. 202
Gazzam on Bankruptcy, 2d ed. 134..... 88
Gen. Stats. of Mass.....269, 314
Getzler v. Saroni, 18 Ill. 518.... 451
Gibbons v. Ogden, 9 Wheat. 189.. 243, 247, 248
Gilbert, 3 N. B. R. 37..... 396
Gilman v. Philadelphia, 3 Wall. 729..... 244
Goodman v. Simonds, 20 How. 343..... 265
Goodridge, 2 N. B. R. 105..... 389
Goodwin v. Sharkey, 3 N. B. R. 138..... 389
Gordon et al. v. Scott et al. 2 N. B. R. 28..... 7
Grady, 3 N. B. R. 54..... 229
Grant v. Hill, 4 Gray, 367..... 343
Greeley v. Wyeth, 10 N. H. 15, 19..... 406
Greenfield, 2 N B. R. 100..... 353
Grey v. Kentish, 1 P. Will. 249.. 202
Griffith, 3 N. B. R. 179.....154, 221
2 Geo. IV. 16..... 86
1 Gray, 653 114

H

Haggerty v. Amory, 7 Allen, 458. 355
Halbert v. Grant, 4 T. B. Monroe, 481..... 407
Hall v. Sullivan R. R., 21 Law Rep. 140..... 251
Hambright, 2 N. B. R. 167..... 301
Hamilton Co. v. Massachusetts, 6 Wall. 639..... 249
Hardcastle, 1 Cox, 397..... 229
Harris v. Avery, 1 Law Rep. C. P. 154..... 247
Harris v. Pratt, 17 N. Y. 209.... 343
Harrington v. McNaughton, 20 Vt. 293..... 354
Hartough, 3 N. B. R. 107. ... 165
Hawkeye Woolen Mills v. Conklin, 26 Iowa, 422..... 407
Hawkin's Appeal, 34 Conn. 548.. 485
Hawley v. Cramer, 4 Cow. 717... 264
Hazard v. Treadwell, 1 Strange, 507..... 403
Heirschberg, 1 N. B. R. 195..... 192
Heirs of Wilson v. Insurance Co., 12 Peters, 140..... 131
Hershpetdt v. George, 6 Mich. 496..... 451
Hicks v. Burfitt, 4 Camp. 435, n. 412
Hill, N. B. R. Sup. iv..... 50
Hill, 1 N. B. R. 114..... 389
Hill v. Sampson, 7 Ves. 170..... 263
Hinde's Lessee v. Longworth, 11 Wheat. 199..... 168
Holbrook v. Foss, 27 Me. 441.... 354
Holbrook v. Jackson et al., 7 Cush. 136, 150.....185, 186, 189
Homer v. Wood, 11 Cush. 62..405, 407
Hotaling et al. v. Cronise et al., 2 Cal. 64..... 70
Hoxie v. Carr, 1 Sam. 173, 183, 192..... 407
Hughes v. Blake, 6 Wheat. 468.. 264
Hussman, 2 N. B. R. 140....388, 390
Hunter v. Hudson River Iron Co., 2 Barb. 493..... 47

Huntington v. Shade, 22 Barb. 164..... 47
1 How. 265..... 102
36 How. 51..... 52

I

Isidor, 1 N. B. R. 33..... 120

J

Jones, 2 N. B. R. 20.....48, 50
Jones v. Howland, 8 Met. 377... 185, 186
Jones v. Smith, 1 Hare, 43..... 263
Jones v. Yates, 9 B. & C. 532... 406
4 Jur. Ch. R. 399..... 15

K

Kelly, 3 N. B. R. 2..... 286
Kendal v. United States, 12 Pet. 616..... 470
Kennedy v. Green, 3 Myl. & Keen, 722..... 263
Kent Com.,.....241, 343
Kerosene Oil Co., 3 N. B. R. 31.. 77, 315
Kilner, Buck, 105..... 412
Kimball, N. B. R. Sup. xliii.... 352
Kissam v. Marshall, 10 Abb. 424. 47
Knight v. Cheney 76, 77
Knowlton v. Hall, 99 Mass. 564.. 40
4 Keyes, 397..... 387

L

Lambert & Bro. v. DeSaussure, 4 Rich. L. R. 248..... 26
Lathrop, 3 N. B. R. 105..... 43
Laws of Michigan of 1844, 77.... 136
" " 1855, 420... 136
Lawson, 2 N. B. R. 125..... 7
Lee v. Kilburn, 3 Gray, 694..186, 342
Levy, N. B. R. Sup. xxx..... 50
Lewis, 2 N. B. R. 145..... 415
Little, 1 N. B. R. 74.....48, 113
Littlefield v. Delaware & Hudson Canal Co., 4 N. B. R. 77..236, 239
Locke, 2 N. B. R. 123..... 415
Lord v. Parker, 3 Allen, 327..... 40
Lowenstein, 2 N. B. R. 99..... 90
Lukins v. Aird, 2 N. B. R. 27... 388
1 Lindley, Partnership..... 441

M

Maddox v. Graham, 2 Met. 56... 106
Malbock v. James, 13 Beasley, N. J. 126..... 407
Mallory, 4 N. B. R. 38..... 478
Malony v. Horan, 52 Barb. 29... 451
Manhattan Co. v. Evartson, 6 Paige Ch. 457..... 451
Marco v. L. & L. Ins. Co., 35 N. Y. 664..... 455
Markson v. Heaney, 3 C. L. N. 153..... 35
Martin, 5 Law Rep. 158.....35, 36
Martin v. Berry, 2 N. B. R. 188.. 88
Martin v. Hunter's Lessees, 1 Wheat. 337..... 468
Martin v. Smith, 4 N. B. R. 83.. 389
Mawson, 1 N. B. R. 33..... 121
May et al. v. Buel et al. 7 Cush. 40..... 373
May v. Chapman, 16 Mees. & Wels. 355..... 265
McCulloch v. Maryland, 4 Wheat. 406..... 248
McIntyre v. Wood, 7 Cr. 506.... 470
McKee v Stroup, Rice, S. C. 291.. 404
McVey, 2 N. B. R. 85..... 121
Merchant v. N. Y. Life Ins. Co., 2 Sand. 659..... 47
Metcalf v. Munson et al. 10 Allen, 491..... 269
Meyer v. Moher, 1 Robinson S. C. Rep. 333..... 451
Miles v. Williams..... 202
Miner v. Pierce, 38 Vt. 610..... 407
Mitford v. Mitford, 9 Ves. 187... 202
Montgomery, 3 N. B. R. 97..... 436
Moore, 1 N. B. R. 123..... 216
Moore, 2 Bt. Rep. 325..... 430
Moore & Bro. v. Harley, 4 N. B. R. 71..... 166
Moore v. Jones, 23 Vt. 739, 746.. 36, 38
Morford, N. B. R. Sup. xlvi.... 48, 49, 50
Morgan et al. v. Thornhill et al., 5 N. B. R. 1..... 234
Mottraw v. Heyer, 5 Denio, 629.. 343
Mudge et al. v. Commissioners of the Exchange and Banking Co., 1 Annual Rep. 8..... 372
Myers, 1 N. B. R. 162..... 389
3 McCord, 38..... 27
3 McLean, 573 387

N

Nary v. Merritt et al , 8 Allen, 452. 269
National Bank v. Com. 9 Wall. 361..... 249
Naylor v. Dennie, 8 Pick. 193... 343
Neal, 2 N. B. R. 82..... 77
New London v. Brainard, 22 Conn. 522..... 106
Norris, 4 N. B. R. 110..... 117

Northy v. Field, 2 Esp. 613..... 343
N. B. R. Sup. xliii..... 52
1 N. B. R. 81, 146..... 186
1 " 204, ... 168
2 " 141..... 389
2 " 138..... 393
3 " 35, 78..... 168
3 " 29, 84, 93, 101..... 186
3 " 100..... 257
3 " 145..... 288
3 " 110..... .....367, 377
3 " 49..... 393
3 " 83..... 492
4 " 178..... 168
4 " 146..... 186
4 " 97..... 384
4 " 1..... .....459, 460
5 " 30..... 288
5 " 62..... 362
3 N. Y. 224..... 355
6 N. Y. 147..... 15

O

Ohio & Mississippi R. R. Co. v. Wheeler, 1 Black, 297..... 110
Orne, N. B. R. Sup. xviii....48, 50
Osborn v. Bank, 9 Wheat. 859... 248 467 468, 471
Owings v. Kincannon, 7 Pet. 399. 131

P

Paine v. Waite, 12 Gray, 390.... 342
Palmer v. Trevoir, 2 Vene. 261.. 203
Parish v. Murphree, 13 Cranch, 92.....141, 169, 459
Parker et al. v. Phetteplace, 2 Cliff. 79..... 246
Parson, Notes & Bills, 263, 269.. 302
Parsons v. Bedford et al. 3 Pet. 448..... 317
Patterson, N. B. R. Sup. xxii.... 50
Penn v. Dunn, 3 J. C. R. 508... 388
Pennock v. Yeager, 5 Phila. Rep. 171..... 406
Perrine v. Chesapeake & Delaware Canal Co. 9 Howard, 172..... 105
Perry, 1 N. B. R. 2.....48, 49
Perry, 1 N. B. R. 155 88
Peterson v. Rawson, 34 N. Y. 370. 455
Phillips v. Frye, 14 Allen, 36.... 40
Pike v. McDonald, 32 Me. 418... 354
Pitney v. Leonard, 1 Paige Ch. 461..... 263
Pomeroy Constitutional Laws, 244..... 243
Potter v. Coggeshall, 4 N. B. R. 119..... 154
Preston, 2 N. B. R. 27..... 48
Pringle v. Phillips, 5 Sand. S. C. 157..... 263
Puffer, 2 N. B. R. 17.....52, 121
Purdie v. Jackson, 1 Russell, 1.. 204
11 Paige, 569..... 15
11 Paige, 535..... 355

R

Rankin & Pullain v. Florida, Atlantic & G. C. R. R. Co., 1 N. B. R. 196.....104, 244
Ratcliffe, 1 N. B. R. 98..... 49
Rathbone, 1 N. B. R. 145..... 389
Redfield on Railways, 53..... 242
Regina v. Leeds and Manchester Railway Co., 3 Q. B. 528..... 106
Repplies v. Bloodgood, 1 Sweeny, (N. Y.) 34..... 89
Rev. Code of Missouri, 1865, 449. 451
Rich v. Cockell, 9 Ves..... 41
Richards v. Talbird, Rice Eq. R. 158..... 451
Richardson, 2 N. B. R. 74..... 35
Riley v. Riley, 25 Conn. 154..... 40
Riper v. Johnson, 12 Minn. 60.. 451
Robb v. Mudge, 14 Gray, 540... 41
Robinson v. Bates, 3 Met. 40.... 451
Rosenfeld, 1 N. B. R. 161.415, 430 432
Rosenfeld, 2 N. B. R. 50..... 192
Rowe v. Rowe, 2 De G. & S. 294. 41
Ruehle, 2 N. B. R. 175..... 122
Russell v. Topping, 5 McLean, 194..... 105
2 Rolle's Abridgement, 488..... 131
2 R. S. 137.....174, 455

S

Salem Milldam Corporation v. Roper, 6 Pick. 23..... 106
Sampson v. Clark, 2 Cush. 173... 354
Sands v. Codwise, 4 J. R. 536, 556..... 407
Savage v. Murphy, 34 N. Y. 508.. 180, 459
Sears v. Hanks, 14 Ohio, 298.... 451
Sedgwick v. Casey, 4 N. B. R. 161. 118
Sexton v. Wheaton, 8 Wheat. 229. 168
Seymour, N. B. R. Sup. vii..... 352
Shawhan v. Wherritt, 7 How. 627..... 210, 274, 332
Sheldon v. Gill, 8 How. 448..... 467
Shepard, 3 N. B. R. 43..... 113
Sherwood, 1 N. B. R. 75..... 255
Simpson v. Carlton, 1 Allen, 109. 342
Skolfield v. Bell, 14 Mass. 40.... 343
Sluyter v. Smith. 2 Born. 673.... 47
Smith, 2 N. B. R. 98.....122, 384
Smith v. Buchanan et al., 4 N. B. R. 60.....209, 274, 333
Smith v. Eureka Flour Mills Co. 6 Cal. 1..... 106
Smith v. Lowe, 1 Atk. 489..... 263

Smith v. Morse, 2 Cal. 542.... .. 106
Society for Savings v. Coit, 6 Wall. 604..... 249
Soule et al. v. Dawes, 7 Cal. 576. 70
Spirett v. Willows, 3 De Gex. 293.. 170, 171, 172, 173, 174
Stables v. Eley, 1 Stark, 314.... 441
Stat. 5, Geo. 2, Ch. 30, S. 13.... 356
State of Michigan v. Phœnix Bank, 33 N. Y. 10..... 455
Stevens v. Blanchard, 3 Cush. 169. 342
Stewart v. Johnson, 3 Har. N. J. 87..... 451
Stilman v. Ashdown, 2 Atk. 481.. 459
Stinson v. Sumner, 9 Mass. 143.. 451
Stokes, 7 Ves. Jr. 408..... 407
Story Eq. Jur.....406, 407, 459
Story on Part..229, 405, 406, 407, 442
Strauss v. Eagle Ins. Co. 5 Ohio, 59..... 105
Street v. Dawson, 4 N. B. R. 60. 209
Strong v. Fish, 13 Vt. 277..... 405
Sturges v. Crowninshield, 4 Wheat. 195..... 373
Sug. on V. and P. 471 263
Summer v. Rabb, 13 Ill. 483..... 451
Sutherland, 1 N. B. R. 140..... 331
1 Scribner on Dower, 610... . 451
1 Stat. at Large..... ....236, 309
2 Stat. at Large..... 309
5 Stat. at Large..27, 28, 101, 175, 316
14 Stat. at Large..2, 4, 5, 6, 7, 193, 234, 250, 264, 305, 308
15 Stat. at Large, 227..... 129
16 Stat. at Large.....2, 237
2 Story on Constitution.....243, 317

T

Taylor, 1 Rose, 175..... 42
Taylor v. Jones, 2 Atk. 601..... 459
Tenny v. Johnson, 43 N. H. 144.. 407
The Collector v. Day, 11 Wall. 124..... 249
The Cordes, 21 How. 23 242
The Lexington, 6 How. 381..... 242
The Lulee, 10 Wall. 202..... 265
Thompson v. Talmie, 2 Pet. 163. 370
Thompson v. Thompson, 4 Cush. 127..... ....186, 342
Thring, Mont. & Ch. 75..... 41
Tidd's Practice, 129, 1136. 1169.. 131
Todd v. Daniel, 16 Pet. 521..... 131
Tower v. Hagner, 3 Whart. 48... 40
Troy & Boston R. R. Co. v. Tibbetts, 11 How. 170..... 47
Turner, 3 Ves. 243..... 147
Turner v. Bank of North Carolina, 4 Dall. 10..... 470
Turner v. Nye, 7 Allen, 178..... 40
1 Tread. Cor. Rev. 119..... 27

U

Union Bank v. Geary, 5 Pet. 111. 264
Union Pacific R. R. Co. v. Lincoln County, 10 A. L. Register, 461.....250, 251
United States Bank v. Planter's Bank, 9 Wheat. 907.....242, 250

V

Van Ness v. Bush, 14 Abb. 36... 47
Van Nostrand v. Barr, 2 N. B. R. 154..... 88
Van Wyck v. Seward, 6 Paige, 62. 169
Veazie Bank v. Fenno, 8 Wall. 533..... 245
Vennard v. McConnell et al., 11 Allen, 562..... 185
Vogel v. Lathrop, 4 N. B. R. 146. 209, 330
Voorhees v. Bank of the U. S. 10 Pet. 474..... 370
32 & 33 Vict. c. 71..... 89

W

Walker v. Walker, 9 Wall. 743... 41
Waterman & Katz v. Preston..294, 297
Watts, 2 N. B. R. 145.....48, 49, 50
Wells, 2 Mont. D. & G. 504..... 41
Wells, 3 N. B. R. 95..... 209
Weston v. Charleston, 2 Pet. 448. 248
White v. Preston..... 294
Wildman..... 147
Williams, 2 N. B. R. 79..... 354
Williams, 3 N. B. R. 74 165
Williamson, 2 Ves (Sen.) 252.... 42
Williams v. Bank U. S. 11 Wheat. 414..... 131
Williamson v. Brown, 20 Law Rep. 320..... 264
Wilson v. Brinkman, 2 N. B. R. 149..... 209
Wilson & Furgurson, 10 How. P. R. 178..... 384
Winkens, 2 N. B. R. 113..... 113
Winks v. Hassall, 9 Bam. & Cress. 372..... 343
Wolcott v. Hodge, 15 Gray, 547.. 354
Woodberry v. Perkins, 5 Cush. 86. 354
Woodward v. Paige, 5 Ohio, 70.. 451
Wright, 2 N. B. R. 155.....318, 329
Wynne, 4 N. B. R. 5.....24, 221
1 Washburn R. P. 203..... 451
2 Wharton, s. 2204..... 387

Y

Yeaton v. Fry, 5 Cranch, 335.... 281
York & Hoover, 4 N. B. R. 156.. 101

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UNITED STATES SUPREME COURT.—DECEMBER TERM, 1870.

[Appeal from the circuit court of the United States for the district of Louisiana.]

Where a bank went into liquidation in accordance with the provisions of a State law in 1868, pursuant to the decree forfeiting its charter, and commissioners were appointed to administer the affairs of the bank, and they accepted the trust, giving the necessary bonds, which trust they continued to fulfill for a year, when an involuntary petition for the adjudication of the bank and the commissioners bankrupt was filed in the United States district court of the district, alleging fraudulent preferences in payments by the commissioners, and also praying that a provisional warrant might issue to take possession of the assets of the bank then in the hands of the commissioners. A decree in bankruptcy was made, and injunctions granted against the commissioners. The commissioners, within ten days of the decree, filed a petition for the review by the circuit court of the decree and order of the district court, and the circuit court affirmed the decree, &c., of the district court.

Application for an appeal to the United States supreme court being immediately made, was refused by the circuit judge; but more than ten days after the decree of the circuit court an appeal was allowed by an associate justice of the United States supreme court.

Held, that decrees in equity, in order that they may be re-examined in this court, must be final decrees, rendered in term time, as contradistinguished from mere interlocutory decrees or orders, which may be entered at chambers, *or*, if entered in court, are still subject to revision at the final hearing. If this rule were not followed in allowing appeals to the United States supreme court, every question arising in the courts may be indefinitely protracted, and the benificent purposes of the bankrupt act be thereby defeated, Appeal dismissed for want of jurisdiction.

MORGAN, et al., v. THORNHILL, et. al.

CLIFFORD, J.—Exclusive original jurisdiction, in all matters and proceedings in bankruptcy, is conferred by the acts of Congress upon the district courts, except that in case of a vacancy in the office of a district judge, or in case the district judge shall, from sickness, absence or other disability, be unable

to act, in which event the circuit judge may make all necessary rules and orders preparatory to the final hearing, and cause the same to be entered or issued, as the case may require, by the clerk of the district court. 14 Stat. at Large, 517; 16 ib. 174.

Certain occurrences, during the late civil war, so crippled the resources of the bank of Louisiana that the directors became unable to comply with the requisitions of their charter. Proceedings were accordingly instituted by the attorney general of the state, under the act "to provide for the liquidation of banks," in the proper court of the state, to forfeit the charter of the bank, and on the 20th of May, 1868, a decree was entered in the case that the charter of the bank be declared forfeited, and that its affairs be liquidated according to law.

Pursuant to that decree the appellants were appointed commissioners for that purpose, and the record shows that they accepted the trust, that they took the required oaths, that they gave the necessary bonds, that they entered upon the discharge of their duties, and that they continued to administer the affairs of the bank until the 20th of May of the following year, when the appellees, or the first three named, filed a petition in the district court for that district, praying that the bank and the said commissioners, in their character as such, might be declared a bankrupt and that a warrant might issue to take possession of the estate of the bank in the hands of the commissioners.

They represented in their petition that the bank and the commissioners had each, within six months preceding the date of the petition, committed an act of bankruptcy, that the corporation had for a long time suspended payment of its commercial paper, and that the commissioners had, within the same period, made certain payments, and transferred certain assets of the bank in payment of its debts, with intent to give a preference to certain creditors of the bank. Special reference to the supplemental petition is unnecessary, as the representations of the petition are substantially the same, and the two were heard together in the court below.

Three several injunctions were granted in the case by the district judge sitting in bankruptcy, and on the 11th of January, 1870; the district court entered a decree that the bank was a bankrupt. Within ten days from the date of the decree a petition for a review of those orders and decrees was filed by the commissioners in the circuit court, under the second section of the bankrupt act, and the circuit court having first heard the parties, on the 2d of March, 1870, entered a decree affirming the orders and decrees of the district court. Application was immediately made by the commissioners for an appeal to this court, which was refused by the circuit judge, but it was ultimately granted by one of the associate justices of this court, more than ten days, however, subsequent to the date of the decree of the circuit court.

Seasonable application for the appeal having been made and a sufficient bond tendered, the appellants contended, and still contend, that the appeal as subsequently allowed operated as a supersedeas from the date of the first application. Different views, however, were entertained by the district judge, and on the 29th of March, 1870, he passed an order directing the marshal to resume possession of all such portion of the assets of the bank as he had surrendered to the commissioners.

Dissatisfied with that order the commissioners applied to the associate justice of this court assigned to that circuit to vacate that order and to enforce the supersedeas supposed to have been created by the appeal as allowed in pursuance of the last application. His opinion was that the appeal, as allowed, related back to the date of the original application for the same to the circuit judge, and that it operated, as a supersedeas, the same as it would have done if it had been granted within ten days from the date of the decree dismissing the petition for a review and affirming the decree adjudging the corporation a bankrupt.

Influenced by those views he made a decree that all the orders in the cause subsequent to the 21st of January, 1870, should be vacated and annulled, leaving the injunction

of that date granted by the circuit judge in full force. Certain other orders, nevertheless, were subsequently made by the district judge; as, for example, he passed an order for the appointment of receivers, and another giving the appointees authority to pay rents, expenses, and charges incurred by them, out of the funds of the bank. Special objection is made by the appellants to those orders as forbidden by the supersedeas, but the main purpose of the appeal when taken was to reverse the decree of the circuit court affirming the decree of the district court and dismissing their petition praying for a reversal of that decree.

Since the appeal was entered the appellees have filed a motion to dismiss the same, upon the ground that no appeal lies to this court from a decree of the circuit court rendered in the exercise of the special jurisdiction conferred upon that court by the first clause of the second section of the bankrupt act. 14 Stat. at Large, 518.

Circuit courts have a general superintendence and jurisdiction, by virtue of that clause, of all cases and questions arising under that act, within and for the districts where the proceedings in bankruptcy are pending, and the provision is that those courts may, upon bill, petition, or other proper process, of any party aggrieved, except when special provision is otherwise made, hear and determine the case [as] in a court of equity, but the next clause of the same section provides that the powers and jurisdiction thereby granted may be exercised either by said court or by any justice thereof, in term time or vacation, and neither of the two clauses makes any provision for an appeal in any such case to this court, whether the case or question presented or involved in the bill, petition, or other proper process is submitted to the court or to a justice thereof, or whether the case or question is heard or determined in vacation or in term time.

Apart from those two provisions the third clause of the section provides that circuit courts *shall also have* concurrent jurisdiction with the district courts of *all suits at law or in equity* which may or shall be brought by *the assignee* in bank-

ruptcy against any person claiming *an adverse interest*, or by *such person* against *such assignee* touching any property or rights of property of such bankrupt transferable to or vested in such assignee.

Controversies, in order that they may be cognizable under that clause of the section, either in the circuit or district court, must have respect to some property or rights of property of the bankrupt transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other. All three of those conditions must concur to give the jurisdiction, but where they all concur the party suing may, at his election, commence his suit either in the circuit or district court, and if in the latter, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the circuit court for re-examination by writ of error, if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damage claimed amounts to more than five hundred dollars and the writ of error is seasonably sued out and the plaintiff in error complies "with the statutes regulating the granting of such suits," or the appeal is claimed and the required notices are given within ten days from the judgment or decree. 14 Stat. at Large, 520.

Such a suit, however, by or against such assignee, or by or against any person claiming an adverse interest in any such property or rights of property, cannot be maintained in any court whatsoever unless the same shall be brought within two years from the time the cause of action, for or against such assignee, accrued; which shows very satisfactorily that the jurisdiction conferred by the third clause is other and different from the special jurisdiction and superintendence described in the first clause of the section.

Where such a suit, between such parties, touching such subject-matter, proceeds in a circuit court to a final judgment or decree, and the debt or damage claimed or the matter in dispute exceeds the sum or value of two thousand dollars, ex-

clusive of costs, no doubt is entertained that the judgment or decree may be removed into this court for re-examination by writ of error, if the judgment was rendered in a civil action, or by appeal if the decree was entered in a suit in equity, as in other similar cases falling within the appellate jurisdiction of this court. 14 Stat. at Large, 521. 1 Stat. at Large, 84.

Creditors whose claims are wholly or in part rejected may appeal from the decision of the district court to the circuit court of the same district, if the appeal is claimed and the required notices are given within ten days from the entry of the decree or decision, but the appellant in such a case is required to file in the clerk's office a statement in writing of his claim, setting forth the same substantially as in a declaration for the same cause of action at law, and the assignee is required to plead or answer thereto in like manner, and like proceedings shall thereupon be had as in an action at law, except that no execution shall be awarded against the assignee for the amount of the debt found due to the creditor.

Assignees, also, who are dissatisfied with the allowance of a claim preferred by a creditor, may also appeal from the decision of the district court to the circuit court of the same district at any time within ten days from the entry of the decree or decision, but it is certain that neither the creditor nor the assignee can appeal to this court from the decree of the circuit court in such a case, as the express enactment is that the final judgment of the court shall be conclusive, and that the list of debts shall, if necessary, be altered to conform thereto.

Confirmation of that view is also derived from the succeeding clause in the twenty-fourth section of the act, which provides that the prevailing party shall be entitled to costs and that the costs, if they are recovered against the assignee, shall be allowed out of the estate of the bankrupt. 14 Stat. at Large, 528.

Authority is also given to any creditor opposing the discharge of a bankrupt to file a specification in writing of the grounds of his opposition, and the court in such case may,

in its discretion, order any question of fact so presented to be tried at a stated session of the district court; and the better opinion perhaps is that the trial contemplated by the section, if ordered, is a trial by jury. 14 Stat. at Large, 532; *Gordon et al* v. *Scott et al*, 2 N. B. R. 28; *in re* Eidom, 3 N. B. R. 39; *in re* Lawson, 2 N. B. R. 125.

Debts contracted by a debtor and provable under the bankrupt act, if the same amount to two hundred and fifty dollars, authorize the creditor or creditors to file a petition praying that the debtor may be adjudged a bankrupt, and the fortieth section of the same act provides that, upon the filing of the petition, if it appears that sufficient grounds exists therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time specified in the order, why the prayer of the petition should not be granted. Prior to the return day of the order it is required that notice shall be given to the debtor, and the provision is that the court shall, if the debtor so demand on the same day, order a trial by jury, at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy. 14 ibid, 527.

Appellate jurisdiction, in its strictest sense, as exercised under the judiciary act, is certainly conferred upon the circuit courts in four classes of cases by the express words of the bankrupt act, without any resort to construction: (1) By appeal from the final decree of the district courts in suits in equity commenced and prosecuted in the district courts by virtue of the jurisdiction created by the third clause of the second section of the act. (2.) By writs of error sued out to the district court in civil actions finally decided by the district courts, in the exercise of jurisdiction created by the same clause of that section. (3) By appeal from the decisions of the district courts rejecting wholly or in part the claim of a creditor, as provided in the eighth section of the act. (4) By appeal from the decisions of the district courts allowing such a claim when the same is opposed by the assignee.

Appeals from the district courts to the circuit courts are not allowed in any case unless the appeal is claimed and notice given thereof to the clerk of the district court, to be entered in the record of the proceedings, and also to the assignee, creditor, or the proper party in equity, within ten days from the date of the decision or decree, nor unless the appellant, at the time of claiming the same, also gives bond in the manner required by law in case of such an appeal from a subordinate to an appellate tribunal.

Whether a writ of error will lie from the circuit court to the district court where the debtor opposes the petition that he may be adjudged a bankrupt, and the question whether he has committed an act of bankruptcy is tried by a jury, as provided in the forty-first section of the act, is not a question involved in the case before the court. Nor is the question presented in the case whether a writ of error will lie from the circuit court to the district court where an issue of fact is framed, as provided in the thirty-first section of the act, and the same is tried by a jury at a stated session of the district court.

Suffice it to say at this time that such cases, when tried by a jury, if the circuit court has any jurisdiction upon the subject, must be removed into the circuit court by a writ of error, as they, when tried by a jury, are excluded from the special jurisdiction conferred in the first clause of the section, by the very words of the clause. Where "special provision is otherwise made" the case is excluded from the general superintendence and jurisdiction of the circuit court by the exception introduced, as a parenthesis, into the body of that part of the section.

Special provision is made in such cases, within the meaning of that exception, when the case is tried by jury, and there is not a word in the act having the slightest tendency to show that Congress intended that a fact found by a jury in a district court should be re-examined in a summary way by the circuit court, and it is not pretended that a party may appeal and be entitled to a second trial by jury, unless the

first verdict is set aside for error of law. Such cases may be tried by the district court without a jury, and in that event no doubt is entertained that the case is within the supervisory jurisdiction of the circuit court.

Due notice was given to the bank of the petition filed in the circuit court that the corporation should be adjudged a bankrupt, and the commissioners, as the legal representatives of the bank, appeared and made defence, but they did not demand in writing, or otherwise, a trial by jury, and the case was heard and determined by the court. Subsequent to the decree adjudging the bank a bankrupt, the commissioners presented a petition to the circuit judge, praying for a reversal of that decree, by virtue of the special jurisdiction conferred upon the circuit court in the first clause of the second section of the bankrupt act, and the petition was heard at chambers, and a decree was entered dismissing the petition, and affirming the decree of the district court.

Independent of the bankrupt act the district courts possess no equity jurisdiction whatever, as the previous legislation of Congress conferred no such authority upon those courts since the prior bankrupt act was repealed.—*Exp.* Christie, 3 How., 311. Whatever jurisdiction, therefore, they possess in that behalf is wholly derived from the bankrupt act now in force.

Undoubtedly the jurisdiction conferred by the third clause of the second section is of the same character as that conferred upon the circuit courts by the eleventh section of the judiciary act, and it follows that final judgments in civil actions and final decrees in suits in equity rendered in such cases, where the sum or value exceeds two thousand dollars, exclusive of costs, may be re-examined in this court when properly removed here by writ of error or appeals, as required by existing laws.

Concurrent jurisdiction with the district courts of all suits at law or in equity are the words of that clause, showing conclusively that the jurisdiction intended to be conferred is the regular jurisdiction between party and party, as described in the judiciary act and the third article of the Constitution.

Cases arising under that clause, where the amount is sufficient, are plainly within the ninth section of the bankrupt act, and as such may be removed here for re-examination, but the revision contemplated by the first clause is evidently of a special and summary character, substantially the same as that given in the prior bankrupt act, as sufficiently appears from the words "general superintendence," preceding and qualifying the word "jurisdiction," and more clearly from the fact that the jurisdiction extends to mere questions as contradistinguished from judgments or decrees as well as to cases, showing that it includes the latter as well as the former, and that the jurisdiction may be exercised in chambers as well as in court, and in vacation as well as in term time.

Much stress was laid, in argument in support of the theory that an appeal will lie to this court from a decision of the circuit court rendered under the first clause of the second section, upon the fact that the case or question, as therein provided, may be heard and determined in a court of equity, as the phrase reads in the printed volume of the statutes at large, but that phrase, even if correctly printed, must be read and considered in connection with the succeeding clause, and when so read and considered it is plain that the meaning is the same as it would be if it read "as a court of equity" or "as in a court of equity;" that it merely prescribes the rule of decision by which the court is to be governed, and that it is entirely consistent with the subsequent clause before referred to, which provides that the case or question may be heard and determined by a justice of the court as well as by the court, and in vacation as well as in term time, which is palpably inconsistent with the theory that Congress intended that an appeal from the decision of any case or question under the first clause should be allowed to this court.

But the phrase "hear and determine the case in a court of equity," as printed in the fourteenth volume of the Statutes at Large, is erroneously transcribed from the act of Congress as it passed the two houses and was approved by the president. Correctly transcribed it reads "hear and determine

the case *as in a court of equity*," which shows, without any resort to construction, that all Congress intended by the phrase was, to prescribe the rule of decision, whether it was made in court or at chambers or in term time or vacation.

Decrees in equity, in order that they may be re-examined in this court, must be final decrees rendered in term time as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court, are still subject to revision at the final hearing.

Adopt the theory of the appellees and the proceedings in bankruptcy might be protracted indefinitely, as every question arising in the courts may be transferred first to the circuit court and then to this court, which would tend very largely to defeat all the beneficient purposes of the bankrupt act.

For these reasons the appeal is dismissed for the want of jurisdiction.

U. S. CIRCUIT COURT—MICHIGAN.

Where a bill was filed to recover certain real estate and personal property alleged to have been conveyed and transferred by the bankrupt within four months next before the filing of the petition against him for adjudication of bankruptcy in fraud of the bankrupt act, and the bill is based on two alternative theories,

1st. That the transfers were without consideration and made to hinder, delay and defraud the bankrupt's creditors, or

2d. If there was a consideration it was a previous indebtedness and the transfers were made with a view to give the defendant a preference, he having reasonable cause to believe the bankrupt insolvent,

Held, Actual possession under the agreement and performance of it clearly takes the case out of the statute requiring the agreement to be in writing. And as to its vagueness and uncertainty in the particulars specified, the agreement having been executed by the actual making of the conveyance, the court will now look into the agreement only for the purpose of ascertaining whether the consideration for the conveyance was such as a court of equity will sustain as against the creditors of the grantor. Looking into the agreement for that purpose I find that full and adequate compensation had been made by defendant under an agreement between him and the bankrupt, made while the latter was amply solvent, and when he had a perfect right as against all the world to make the same, and hence the conveyance of the one hundred and seven acre tract ought to be sustained.

As to the personal property it was objected at the hearing that the assignee has a complete remedy at law, and therefore cannot recover for the same by bill in equity. This objection comes too late. It was not taken by de-

murrer nor by way of answer, but was first made at the hearing. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law where, as in this case, the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon.

Decreed that defendant account to complainant for all personal property received by him from the bankrupt at any time within four months immediately preceding commencement of bankruptcy proceedings.

Decree for plaintiffs for land not included in agreement, for payment for the personal property, and for costs, and dismissal of bill as to the Butterfield Farm of one hundred and seven acres.

H. POST, Assignee, v. *S. I. CORBIN.*

LONGYEAR, J.—The bill was filed to recover certain real estate and personal property alleged to have been conveyed and transferred to defendant by the bankrupt within four months next before the filing of the petition against him for adjudication of bankruptcy, in fraud of the bankrupt act.

The bill is based upon two alternative theories: First, that the transfers were without consideration, and were made with the intent to hinder, delay, and defraud the creditors of the bankrupt; or, second, if there was a consideration it was a previous indebtedness, and the transfers were made with a view to give the defendant a preference, he having reasonable cause to believe that the bankrupt was insolvent.

The real estate consists of two parcels, one of one hundred and seven acres on section twenty-eight in the township of Armada, in the county of Macomb, known as the "Butterfield Farm," and the other of twenty acres on section fifteen in the same township. These parcels do not adjoin, but lie some two miles distant from each other.

The answer admits the conveyance of the real estate, but denies the transfer of personal property as alleged in the bill —denies the intent to defraud, and knowledge or belief, and reasonable cause for belief, of the insolvency of the bankrupt. As to the Butterfield Farm, the answer alleges that when the same was purchased by the bankrupt it was so purchased for the defendant, and was conveyed to him under and in pursuance of an agreement between them, at or about the time of the purchase, for the support of the three minor daughters of the bankrupt by the defendant, and the

avails of the products of the farm over and above what should be necessary for the support of defendant's family, and such other payments as defendant could make, until such support of said minor children, avails of products and other payments should amount to a fair compensation for said farm, which agreement, it is alleged, had been fully performed by the defendant when said conveyance was made to him. And as to the twenty acres, it is alleged that the same was included in the deed of conveyance because it had been used in connection with and as a part of said farm.

The agreement and the performance of it by defendant are satisfactorily proven substantially as alleged in the answer; and, in fact, the theory of the bill, that the conveyance was without consideration, was abandoned by complainant at the hearing. It was contended, however, that the agreement not being in writing, and being vague and uncertain in some of its material provisions, such as the price to be paid and the time within which the agreement was to be performed, it was not such an agreement as a court of equity would have decreed the specific performance of, and that, therefore, what the bankrupt had received from defendant constituted an indebtedness merely, and that the conveyance must be held to have been in satisfaction of such indebtedness, thus bringing the case under the second theory of the bill.

Actual possession under the agreement and performance of it clearly takes the case out of the statute requiring the agreement to be in writing. And as to its vagueness and uncertainty in the particulars specified, the agreement having been executed by the actual making of the conveyance, the court will now look into the agreement only for the purpose of ascertaining whether the consideration for the conveyance was such as a court of equity will sustain as against the creditors of the grantor. Looking into the agreement for that purpose I find that full and adequate compensation had been made by defendant under an agreement between him and the bankrupt, made while the latter was amply solvent, and when he had a perfect right as against all the world to

make the same, and hence that the conveyance ought to be sustained.

This, however, relates to the one hundred and seven acre tract only. The twenty acre tract stands upon entirely different grounds. It was not included in the original or any subsequent agreement. And as to its being in payment of any indebtedness of the bankrupt to the defendent, it is clear to my mind, from the proofs in the case, that the idea of debtor and creditor, as between these two, never existed. The son, the defendant here, was to have the "Butterfield Farm," and, in turn, was to support and maintain the three minor children, his sisters, have the support of himself and family out of the proceeds of the farm, and the bankrupt was to have the rest. Defendant may have done for and paid his father more than the land was actually worth in the encumbered condition in which the title was made over to him, but so long as that arrangement was allowed to continue and remain open between them, their transactions must be referred to it except in cases where it clearly appears that such was not the intent. No books of account were kept between them, and at the time of the conveyance no settlement was had, no computation of how much had been paid by defendant to his father, and no claim made of any balance due him; but it is evident from the whole transactions between them, down to and including the giving of the deed as detailed by the proofs, that it was a sort of lumping transaction, so to speak, and that the conveyance of the farm was all defendant ever expected from his father for past transactions, and that it was received by him in full satisfaction. But as between the deendant and his father's creditors, the one hundred and seven acre tract is all he had any right to expect or receive, and therefore the twenty acre tract must be held to belong to the assets of the bankrupt's estate.

As to the personal property it was objected at the hearing that the assignee had a complete remedy at law, and therefore cannot recover for the same by bill in equity. This objection comes too late. It was not taken by demurrer nor by

way of answer, but was first made at the hearing. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law where, as in this case, the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon. Sec. 6, N. Y. 147; 4 Cow. 727; 11 Paige, 569; 4 J. Ch. R. 399; 2 Caines' cases in error, 57; 1 Atk. Ch. R., 126.

If, as has been before intimated, the relation of debtor and creditor did not exist between the defendant and his father, then there was no consideration for the transfer of any of the personal property to defendant, any further than as such transfers were accompanied by a then present consideration passing from defendant. But even allowing that the relation of debtor and creditor did exist between them, (which, however, I understood to be disclaimed at the hearing), and that such property was received by defendant on account, I think he is not entitled to hold the same as against his father's creditors, for the reason that he had reasonable cause to believe that his father was insolvent. His father's insolvency seems to have become quite notorious in that community, and defendant himself testifies that he had "heard stories" about his father's embarrassments, and one of the creditors testifies to a conversation with defendant about his debt, in which he told him he should sue if it was not paid.

Upon the whole, therefore, the defendant must be decreed to account to complainant for all personal property received by him from the bankrupt at any time within four months next previous to the filing of the petition for adjudication of bankruptcy.

Let a decree be entered in favor of complainant for the twenty acres of land, for the payment of six hundred and five dollars and fifty cents, for the personal property, and for costs, and dismissing the bill as to the one hundred and seven acres of land known as the "Butterfield Farm."

U. S. CIRCUIT COURT.—N. D. NEW YORK.

Where the debtor was a merchant and judgments had been recovered against him, executions thereon issued and levy made on his stock of goods, conceded valid liens, an endorser for the insolvent, whose liability had become fixed by the protest of two several notes, purchased the entire stock of goods, giving as part payment his two checks, (which were duly paid,) the one to pay the sheriff for the amount of the levy and conceded value, and the other to cover his liability as endorser on notes then due and to become due, the amount of such purchase being the full value of the stock and more than could have been realized at a forced sale, it being agreed the purchaser should account for and pay over to the insolvent the surplus arising from the sale to an amount larger than that included in the checks.

In March, 1869, bankruptcy proceeding were commenced against the insolvent, alleging a fraudulent preference, &c., and an adjudication followed. The assignee brings his action to recover the value of the goods, and for a decree that the purchaser be prohibited from filing claims against the bankrupt's estate, or even being entitled to a dividend in the moneys advanced by him to pay the lien admitted valid.

Held, That as it was evident that there was an intent to secure a preference, but even if no such intent existed it must be held that the transfer was in fraud of the bankrupt law, and must be set aside on that ground, and the endorser taking the transfer held to account. That the bankrupt law has provided the best mode of administering the estate of an insolvent, and will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor justify such an attempt by the excuse that they thought such plan wiser or better. That defendant must therefore account for all moneys in his possession, and that he must pay the market value of all the property he cannot deliver, with interest thereon from the time he sold or appropriated it to his own use from the date of the sale, and also must pay the amount of his collections, with interest since the demand.

COOKINHAM, et al., assignees v. *MORGAN, et al.*

WOODRUFF, J.—The evidence in this case establishes, as I think, conclusively

1st. That on the 18th of February, 1868, John P. Babcock, the bankrupt, was hopelessly insolvent.

2d. That the defendant, Morgan, had reasonable cause to believe that Babcock was at that time insolvent.

3d. That the sale by Babcock and the purchase by Morgan were made with intent to give to the latter a preference over other creditors. Although the instrument of transfer does not in terms so express, I am satisfied that the agreement, understanding and intent was, that the purchase price and the collections to be made from the accounts, &c., should be applied first to the payment of the judgments,

wherein executions had been levied on the goods; next to the payment of the debts for which Morgan was liable as indorser.

4th. The sale of Babcock's entire stock of goods, &c., and the placing of his accounts and credits in Morgan's hands, including his entire property, he being a trader, (property exempt from execution only excepted), was so entirely out of the usual course of business as to raise the presumption of fraud declared by the statute, and the evidence fails, in my judgment, to overcome that presumption.

Babcock was a trader, he was not only embarrassed but was so entirely unable to meet his engagements, that judgments had been recovered against him and his entire stock of goods, (which constituted nearly all of his property liable to execution), was held by the sheriff under levy of execution, and two or more of the notes endorsed by Morgan had been protested. This Morgan knew. No reasonable man could, I think, then doubt Babcock's insolvency. Surely this was reasonable cause for believing it. Indeed, the balance of the evidence inclines me not only to think that Morgan knew of this insolvency, but that the purchase and the taking of the notes and accounts for collection was for the distinct purpose, in his mind, of securing such control as would secure him against loss by his endorsements for Babcock.

It follows that the transaction is void, and Morgan is expressly excluded in such case from proving his debt as a claim against the estate of the bankrupt.

The assignees, complainants herein, are entitled to recover back all the property which Morgan received, and as to any part thereof which the latter has sold or appropriated to his own use, they are entitled to recover the value thereof with interest from the time of the conversion or collection thereof and demand by the assignees.

If the transfer were set aside upon technical or other grounds, entirely consistent with good faith in the transferee, and he appeared to have acted under an honest mistake, it might be proper to allow him the amount of the judgments

which he paid in order to obtain the benefit of his purchase, and the amount which he collected from the accounts and paid over to his principal, which is testified to have been about three hundred dollars. Not so where the facts are as above found.

He obtained the property by means which were a clear fraud upon the bankrupt act, and under circumstances which make it a fraud upon the other creditors, and presumptively he knew it. And the moneys which he collected from the accounts went directly to the performance of the understanding that they should be applied in discharge of his endorsements. I am aware that there is contradictory testimony, but I state my conclusions upon all the proofs.

I do not think it necessary to discuss the evidence in detail. The defendant, himself a lawyer, and presumptuously familiar with the law governing the subject of transfers of property by insolvents, and familiar also with the proper influence of facts and circumstances, as well as direct testimony in establishing the allegations of interest, cannot, I think, doubt the correctness of the conclusions I have reached therefor. Possibly he may, under the strong influence of interest, have deceived himself into a belief that what was done and intended was consistent with the laws relating to the property of an insolvent. But if I had considered that preference to himself was not the immediate purpose of the transaction, I must still hold that it was a transfer in fraud of the bankrupt law, and set it aside on that ground holding him liable to account.

The bankrupt law, conceived and enacted in the belief that it provided the best mode of administering the estate of an insolvent, will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor justify such an attempt by the excuse that they thought such other plan easier or better.

The defendant must therefore account for all the property received. He must deliver to the assignees all that remains in his possession. He must pay the market value of

all that he cannot so deliver with interest thereon, from the time he sold or appropriated it to his own use, with this qualification, that interest will not be computed against him from a day earlier than the twenty-ninth day of June, 1868, when the assignees demanded the same from him, and in like manner he must pay the amount of his collections with interest since such demand.

A decree must be entered in conformity with these views and referring it to a master to take the account and superintend the delivery of the property and report the amount due. On the coming in and confirmation of his report final decree will be entered for the complainants to recover such amount with costs.

A. J. & I. C. McIntosh, attorney for assignee.

S. S. Morgan, defendant's attorney in person.

U. S. CIRCUIT COURT—NEW YORK—June Term, 1871.

Woodruff & Hall J.J.

Where a decree is entered in the district court in favor of complainant, and respondent files notice of appeal giving requisite bond and citation issues within ten days and in due time, but the transmiss upon appeal not having been filed in the circuit court until May, 1871, after two terms had gone over, on motion to dismiss appeal because transmiss had not been filed at next term after the appeal,

Held, Motion denied because time to dismiss appeal had been enlarged by agreement of counsel which is permissable, and therefore this case does not come within decision *in re* Alexander, 3 N. B. R. 6.

BALDWIN, Assignee v. *RAPPLEE.*

In December, 1870, a decree of the district court was entered in favor of the complainant. The respondent filed notice of appeal, gave the requisite bond, and had a citation issued all within ten days and in due time; but the transmiss upon appeal was not filed in the circuit court until May, 1871, and after two terms had passed. This had happened through an agreement of counsel that the transmiss should be printed before being filed, and the appeal and the argument were stipulated over the two intervening terms. A motion was now

made to dismiss the appeal because the transmiss was not filed, and the appeal thus entered at the term next after the taking of the appeal, and it was claimed that this was a matter of jurisdiction and could not be waived by stipulation.

WOODRUFF, J., denied the motion and said that while the sweeping language used by Chief Justice Chase, in Alexander's case, 3 N. B. R. 6, seemed to imply that the motion should be granted, yet it was evident that no such question was before him, and his language was not as well considered as if the points had been argued. That while there would not be any doubt that if the appeal were not taken in ten days under section eight, this court would not and could not get any jurisdiction of the appeal. Yet the court does, by the filing and serving notice of appeal within the ten days, obtain jurisdiction, and that the words of the eighth section which refer to the entering of the appeal at the next circuit, are merely directory, and that the time for filing the transmiss may be enlarged by agreement, as was done in this case.

C. G. JUDD, for the motion.

WM. KERNAN, opposed.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

A creditor who does not appear upon the return day of the order to show cause why discharge should not be granted, has no standing in court and cannot subsequently file specifications against bankrupt's discharge.

It is not necessary to state in specifications that the persons named to whom fraudulent payments are stated to have been made, were creditors of the bankrupt.

False swearing, if alleged, must be charged to have been wilful.

The strictness of common law pleading is not required in creditors' specifications, but the bankrupt is entitled to such particularity of statement as will give him reasonable notice of what is expected to be proven against him.

In re SMITH & BICKFORD.

HALL, J.—The bankrupts in this case have made an application for an order striking out the specifications filed by George D. Russell & Co. and William P. McLavem & Co., and for their final discharge.

No appearance for or by George D. Russell & Co. was entered on the day on which the order to show cause was returnable, and on which it was referred to the register to ascertain and report whether the bankrupts had in all things conformed to the provisions of the bankruptcy act, and were entitled to their discharge, and their specifications must therefore be stricken out.

The appearance of McLavem & Co. was duly entered and in proper time, and their specifications were filed within the ten days allowed for that purpose by the general orders in bankruptcy; but it was insisted that these specifications were insufficient, and should, for that reason, be stricken out. These specifications, from the first to the tenth, both inclusive, are based upon the express provisions of the twenty-ninth section of the bankrupt act, that no discharge shall be granted if the bankrupt has, within the time limited in the act, "given any fraudulent preference" contrary to its provisions, "or made any *fraudulent payment*, gift, *transfer*, conveyance or assignment of any part of his property," or "has been guilty of any frauds" whatever, contrary to the true intent of the act.

The first of these specifications alleges that the bankrupts, being insolvent, made fraudulent payments to the firm of Smith, Wemple & Co., at Albany, of the sum of one hundred thousand dollars and over, on divers days from the twenty-first day of September 1869, to and including the fourteenth day of the succeeding month. Those from the second to the tenth, both inclusive, allege in substance that the bankrupts, being insolvent, and with the intent and design on their part to give a preference to the parties or persons particularly named in such specifications respectively, and in fraud of the provisions of the bankrupt act, did, at or about certain times or in certain months named in such specifications, (and being within four months of the time of filing the original petition), pay certain sums of money—some specifically and some generally stated—to certain persons and firms therein named, giving their places of residences or stating that they are unknown to the opposing creditors.

It was insisted that these specifications were bad because they did not allege that these payments were made in contemplation of becoming bankrupt, nor expressly allege that the persons to whom they were made were creditors of the bankrupt. The provisions of the bankrupt act, before referred to, on which these specifications are based, do not, in express terms, require that the fraudulent preference given, or fraudulent payments or transfers made, shall be given or made to a creditor of the bankrupt, or even to one to whom he was or might become liable, though it is probable that cases of that character are those intended to be embraced and provided for. *Fraudulent* preferences given, and *fraudulent* payments and transfers made, both "in fraud of the provisions of the bankrupt act," are expressly and distinctly alleged, and the obvious and ordinary construction of these allegations, under the legal rules of construction which require a similar interpretation of the language of the provisions of the bankrupt act on which these specifications are based, is, that these preferences were given, and fraudulent payments and transfers made, to the persons named as creditors, real or supposed, of the bankrupts, or as persons to whom they were or might become liable. The language of the specifications in this respect is in substance like that of the provisions referred to.

The motion to strike out these specifications is therefore denied.

The eleventh and twelfth specifications may be literally true, and yet the errors or omissions alleged, may have been the result of accident, honest mistake or want of knowledge or information, and there is no allegation of wilful false swearing, wilful or intended concealment, or other fraud or unlawful intent. These specifications are therefore considered insufficient.

The thirteenth specification is too general, indefinite and uncertain, especially as no want of specific knowledge or information is averred, or any other excuse given for these apparent defects. The strictness of common law pleading is

not required in these cases, but the bankrupt is entitled to such particularity of statement as to give him reasonable notice of what is expected to be proved against him; and in this respect the thirteenth specification is deemed objectionable. The same objection might also be urged against the eleventh and twelfth specifications, and perhaps the first ten of the specifications might also have been made more specific and certain. They are, however, considered sufficient to give to the bankrupts the information to which they are entitled, of the character and extent of the proof intended to be made under these specifications, especially as such proof must relate to the acts of the bankrupt and to matters which must be supposed to be peculiarly within their knowledge.

The eleventh, twelfth and thirteenth specifications must be stricken out, unless the opposing creditors elect to pay fifteen dollars costs, and amend the same within fifteen days.

GEO. GORHAM for the motion.

J. M. SMITH opposed.

U. S. DISTRICT COURT—SOUTH CAROLINA.

A landlord has a lien in the state of South Carolina on the personal property of the tenant, which is good for one year as against execution and other creditors.

Under the Statute of Anne, a landlord has a secured lien for his rent in the state of South Carolina, and that law is still in force, not having been repealed by the military order of General Sickles.

An assignee in bankruptcy is bound to respect the landlord's lien for rent.

In re W. J. TRIM, ex parte E. W. MARSHAL, Agent.
In re J. PURCELL, ex parte T. D. WAGNER and E. M. BOWMAN v. *T. D. WAGNER et al.*

The same question in all these cases was submitted to and reported upon by the register in bankruptcy and a special referee. Exceptions were filed to the reports, and the cases are before me on these exceptions. I shall, for convenience, confine the discussion to one case, that of *ex parte* Wagner, the decision of which will apply to the others.

After protracted deliberation, and a thorough examina-

tion of all the authorities bearing on this issue, English and American cases, with the benefit of exhaustive arguments by counsel of the first ability and learning in this case and others, I have come to the conclusion opposed to that of the referee in this case, himself so greatly distinguished for learning, experience, and ability, and feel compelled to overrule his judgment.

My mind is satisfied with the reasoning of the Chief Justice in the analogous case of Charles H. Wynne. I accept his ruling as ascertaining the meaning of the word "lien." "Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." And in the language of the Chief Justice, in the same case, 4 N. B. R., 5, "I think a lien of this sort" is given by the statute of 8th Anne, Ch. 14, P. Laws, 97, of force in this state.

This lien is not dependent on a distress warrant or an execution. The charge on the property or the proceeds of the property, is a charge because by the statute, where there is an execution, the charge is paramount to the levy itself. It ranks the levy. The very fact that it is paramount to the levy proves that it is a lien. It is not necessary that in point of fact there should be an execution. But if there were, in the language of the Chief Justice, "would it not be trifling with the plain sense of words" to say that "the claim which by law is made superior to the lien, is itself not a lien"? The *statute* creates a lien, not the *execution*. It creates a charge upon the property which excludes even an execution. The lien, so far from being credited by the execution, ousts it. If it had not a previous existence, how could this be? The property then in the hands of an assignee is in the hands of the law, as much so as if in the possession of the sheriff, and to be disposed of subject to this charge, and against all other liens, the highest possible lien being a levy which is the consummation or execution of an execution.

The parties to this contract entered into it with remedy of

distress at common law, and the lein upon the proceeds of personal property upon the premises, upon sale by execution by the sheriff, for the payment of the rent, as an essential part of the contract. The landlord put his property in possession of the tenant, with an anticipative execution in his hands, as security for his rent when due, and the protection against any other levy by the Statute of Anne, to the extent of one year's rent. He might neglect or waive his rights at common law, or under the statute, but on the conditions and under the circumstances prescribed by the common law and the statute, the protection was prompt, in his own power, and so sufficient and prevailing as to be paramount to an execution upon a hostile process. Let it be remembered that the landlord begins as to his debt where other creditors end; he has the consummation of a judgment put into his hands, an execution for the security and payment of his debt before suit. In other words he has a right to do before suit, as to all personal property, (unless specially employed), upon the premises of his tenant, what any other creditor can only do at the end of the law.

We hold with the Chief Justice, and resting upon the authorities he cites, and on his own great authority, that "by the bankrupt act all the rights and all the duties of the bankrupt in respect to whatever property not expressly excluded from the operation of the act he may hold, under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of the filing the petition in bankruptcy, and all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lein upon property, such jurisdiction will not be divested."

Under our act, differing in this respect from the opera-

tion of the English bankrupt act, all process is stayed by the assignment of the bankrupt, and among others the process of a distress warrant. It must be in effect executed by the assignee. He takes the property subject to the duty of executing it. It cannot, as under the English system, be executed by the landlord himself, and it is because he cannot that the assignee is bound to do it. And it is only because under the English law that the landlord has a right to levy his *distress* warrant after the assignment, that the duty is not imposed upon the assignee, to pay the claim of the landlord and satisfy what the text books and the most renowned Judges of England style, his "lien." The assignment would be regarded as an execution under the statute of Anne, if the landlord had not the right to make his levy and collect his debt in spite of it. In other words the assignment, then, as in this country, would be accepted as a statutory execution, and the right of the landlord, whether based upon the common law or the statute of Anne, would be protected and enforced by the assignee. See *In re* Appold, 1 N. B. R. 178.

Our own local law reports furnish a case in which the rights of the landlord under the statute of Anne is most strikingly illustrated and enforced. It is the case of *Lambert and Brother* v. *DeSaussure*, assignee, 4 Richardson's L. R. 248. The case and the point ruled is sufficiently stated in the Rubric. It is this: a tenant against whom there was a *fi. fa.* under stay, made an assigment for the benefit of creditors, of furniture in the house which he occupied as tenant. The execution creditor agreed that the assignee might sell the furniture and hold the proceeds subject to all *legal liens*. After the assignment, but before the removal and sale of the furniture, the rent fell due. Held, that the assignee was bound to pay the rent in preference to the debt under the *fi. fa.*"

Mr. Justice Whitner, speaking for the supreme court of the state, remarks, "when the assignment was first heard of and examined into, the plaintiffs (in execution) early expressed their willingness by their attorney, to abide a sale by the assignee in lieu of the sheriff, subject to liens according to law.

But without compromising the plaintiffs by any particular form of expression, in point of fact, the sale was made by the assignee. Suppose it had been by the sheriff, in virtue of the execution at the earliest day, according to the indorsement on the record, to wit: the 1st January, 1849. The rent was due to the landlord before that day, and hence the sheriff must have paid the sum claimed on notice, before the removal of the goods under the provisions of the statute of Anne." See also 1 Tread. Cor. Rev. 119, 3 McCord, 38.

There is another view based upon our state legislation, which serves to ascertain the value and rank of the landlord's claim for rent, and to establish the justice of the allowance of it as a preference over general creditors.

It will be seen in reference to the act regulating the order in which debts due by testators or intestates' estate, (S. C. Statutes at large, 5 vol. 111, sec. 21,) that rent must be paid before bonds or other obligations. Rent is paid to their total exclusion if there be not funds to pay both. The analogy is the stronger from the fact that this order of payment is as to an estate and an insolvent estate. In both cases the debts must be paid out of the estate. There is no other fund to look to. In either case each party, so far as his creditors are concerned, is, in legal contemplation, equally dead. Neither have any future upon which the creditors can proceed. He who is dead is done with earth, and can work no more for his creditors. And he who is discharged in bankruptcy is no longer legally bound to work for them; his release from his creditors is as perfect under his certificate of discharge as he who is released by death; and whatever property he may subsequently make is his, and not legally liable for his debts. Death in the one case and the certificate in the other, is an equally valid discharge from all obligations. The creditor can alone in either case, therefore, look to the estate, and if not paid out of it, he must go unpaid so far as the law can help him to payment.

The case of a general creditor whose claims rests on a specialty, or note, or open account, in the case of a deceased

person's estate, and who is postponed and excluded by the claim for rent is certainly equally hard as that of a like creditor under the bankrupt law. And let it be observed that this satisfaction of the claim for rent is without limitation as to time, so far as the general creditor is concerned. It is paid in full for whatever time as respects him. It is a charge upon the whole estate, which must be satisfied before any unsecured obligation can be paid, and to the extent of a year's rent is a paramount lien upon any personal property upon the premises of the deceased, being "one of those cases where a creditor may have a lien on any particular part of the estate." Stat. at Large, 5 vol. 101, sec. 26. And here let it be remarked, so far as the hardships of excluding the general creditor and preferring the landlord under the law is concerned, that they both contract under the law and in reference to it.

For illustration: when this contract between the bankrupt, Purcell, and the claimant, Mr. Wagner, was entered into, and Mr. Wagner parted with the Mill's House, it was upon the security which the law gave him for his rent. He confided in that security. He knew that he had the right of distress generally; he knew that to the extent of one year's rent he had a lien under the statute of Anne, paramount to a hostile execution; he knew that in the event of his tenant's death, that he had a lien or preference protected by law extending to all his estate, as against the general creditors of the estate. And it is, in my esteem, legitimate to say—I am not advised to the contrary by any decision—that to the extent of one year's rent in such contingency he had also a lien upon the furniture of his tenant, paramount to all other liens, as in the category of "those who have a lien on every particular of the estate," under the act heretofore referred to. And all the other creditors of Mr. Purcell contracted with him with reference to these rights of the landlord.

When they trusted their money or other property to him it was with the knowledge of these rights. They were at liberty to protect themselves by demanding adequate security.

If they trusted to his sufficiency to pay in any event, it is their misfortune. They knew they were dealing with one who had special claims upon him, qualifying their claims and putting them at hazard.

It is a hardship that they suffer, but it is a legal hardship, and one they ran, when, without security, they trusted their property or loaned their money to the bankrupt. It is certainly a usual and a prudent thing, and a just thing as well, that when a man parts with his property he should have security for its return. The banks exact it. Money loaned on land by individuals, almost as a matter of course, is secured by bond and mortgage or confession of judgment. It is not objected to the banks or individuals in these cases, that security is demanded and exacted. Yet rent is in substance so much money, and the claim that it should be made secure is certainly equally reasonable. In a mere business point of view is it not equally fair and just that I should demand security for the loan of my house as the loan of my money?

The landlord, in this case, trusted to the security of his legal preference and protection. If the law did not afford him protection, is it not true, in the nature of things, that as the banks and other capitalists, the landlord would require in advance security for his rent, the loan of his property? A lien in some shape, or security equivalent to it in each doubtful case, would be exacted.

Generosity and gratuities do not belong to money transactions or the exchanges of property in any form. When a man gives a certain property he wants a certain equivalent in return, and to get back what he gives. When he gives so much value as in the shape of the loan of a house, he wants so much value in the shape of rent, and to be as secure in getting it as the other party is secure of getting its equivalent; all else is gratuity and kindness, and strict business-like commerce and exchanges of values with mutual security.

It is my judgment, therefore, on the whole, under the statute of Anne, unrepealed by the military order of General Sickles, and still in force and operation, as much so as the lien under

the intestate's act, that to the extent of one year's rent and interest on the amount, due notice having been given to the assignee, the lien of the claimant, Mr. Wagner, is valid, and it is made the duty of the assignee, as the representative of the rights and the duty of the bankrupt under the act, to satisfy it out of the proceeds of the personal property on the premises.

It is therefore *ordered* and *decreed*, that the assignee in each of the above cases do pay into the registry of this court the amount reported to be due for one year's rent, with interest, from the bankrupts respectively to their respective landlords.

GEORGE S. BRYAN, *District Judge.*

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where one member of a firm files his petition in one state and requests his copartners to join him in the proceedings, which they refuse to do, but subsequently appear by attorney and consent to an adjudication, whereupon all the members of the firm are adjudicated bankrupt, and upon the application for the discharge of the bankrupts, specifications are filed in opposition to their discharge on the grounds of a want of jurisdiction,

Held, That section thirty-six, taken in connection with section eleven, supplemented by General Order XVIII., should be construed together. Section thirty-six provides, that "if such copartners (that is copartners in trade, who are sought to be adjudged bankrupts on the petition of themselves or any one of them of any creditor of theirs) reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." The court which first obtains jurisdiction over the subject matter of the petition, and over the person of the petitioner, shall have exclusive jurisdiction over the case; that is over the subject matter of the petition, and over all the copartners if the non-petitioning copartners be brought in by appropriate process. Objections to jurisdiction overruled.

In re J. R. PENN, et al.

BLATCHFORD, J.—On the application for the discharge of these bankrupts, the question of the jurisdiction of the court to entertain at all these proceedings in bankruptcy is raised. Specifications have been filed in opposition to the discharge of the bankrupts. Two of these specifications are addressed to the question of jurisdiction, and the case has been argued on that point alone preliminary. On the 31st of December, 1868, the bankrupt, Penn, filed in this court a

petition addressed to the judge of this court, setting forth "that the said John R. Penn is a copartner in the firm of Culver, Penn & Company, a copartnership composed of said petitioner and Charles V. Culver and Lucien H. Culver, who both reside in the county of Venango, in the State of Pennsylvania; that John R. Penn has resided for more than six months next immediately preceding the filing of this petition at the city of New York, within said judicial district; that the members of the copartnership owe debts exceeding the amount of $300, and are unable to pay all their debts in full, and that Charles V. Culver and Lucien H. Culver have been requested by the petitioner to unite with him in this application, and refused so to do; that the petitioner is willing to surrender all his estate and effects, joint and individual, for the benefit of their creditors and his own, and desires to obtain the benefit of the bankruptcy act, and desires to effect an adjudication of bankruptcy of the said partnership and all the members thereof."

The petition refers to a statement of the debts of the copartnership, and also to a schedule containing Penn's individual debts and an inventory of his estate, and prays that the copartnership and each member thereof may be adjudged bankrupts. On the filing of this petition, an order was issued by this court requiring Charles V. Culver and Lucien H. Culver to show cause before it, on the thirtieth of January, 1869, why the prayer of the petition should not be granted. They appeared by attorney on that day, and filed a written consent to be adjudged bankrupts, and on the same day an order was made adjudging Penn and the two Culvers bankrupts. It is contended that the proceeding of Penn, as against the Culvers, was a proceeding in involuntary bankruptcy, and that it was necessary the petition should allege as having been committed by the Culvers, or by the firm, some one of the acts of bankruptcy specified in section thirty-nine of the act. In these views I cannot concur. The petition of Penn was, so far as he was concerned, a voluntary petition under section eleven. In addition it states that he

is a copartner in a firm which it names, and whose component members it names. It states the residence of the then members, and avers that they owe debts which they are unable to pay. It alleges that the other two members of the firm have been requested by the petitioner to unite with him in the application, and that they refused to do so, and that he desires to effect an adjudication of bankruptcy of the copartnership. It then annexes schedules of the debts and assets of the copartnership, and prays that each member thereof may be adjudicated bankrupt. Where is the authority to be found for inserting these averments in the petition of Penn, or for filing a petition by Penn, praying for an adjudication as respects the Culvers, unless the Culvers sign the petition containing such prayer? I conceive that full authority is found in section thirty-six of the bankrupt act, and in General Order XVIII. The thirty-sixth section provides "that where two or more persons who are partners in trade shall be adjudged bankrupts, either on the petition of such partners or any one of them, or on the petition of any creditor of the partners, a warrant shall issue upon which all the joint stock or property of the copartnership, and also all the separate estate of each of the partners shall be taken." This provision clearly contemplates that persons who are copartners may be adjudicated bankrupts on three descriptions of petitions. First—The petition of all the copartners. Second—The petition of one of the copartners. Third—The petition of a creditor of the copartners.

The proceeding by the petition of all the copartners is a purely voluntary petition under section eleven. Where they all unite in its jurisdiction as to all of them, it must appear by residence or by carrying on of business. In the present case the Culvers could not have united in the petition of Penn, because the petition could not have truly made the averments required by section eleven to give this court jurisdiction through residence or the carrying on of business. The proceedings by the petition of a creditor of the copartners is a purely involuntary proceeding under section thirty-nine, and

requires the adjudication to proceed on the commission of some act of bankruptcy specified in that section. A proceeding by copartners under section eleven requires no act of bankruptcy to be set forth, but only an averment that the debtors are unable to pay all their debts in full, and are willing to surrender all their estate for the benefit of their creditors, and desire to obtain the benefit of the act. The filing of such a petition is declared by section eleven to be an act of bankruptcy. The proceeding by the petition of one of two or more copartners to have such copartners adjudicated bankrupts is a proceeding which necessarily is neither wholly voluntary nor wholly involuntary, but it is partly voluntary and partly involuntary. So far as the petition is concerned, it is voluntary under section eleven; so far as the copartners not petitioning are concerned, it is not involuntary in the sense of section thirty-nine, unless the adjudication is asked for on the ground of the commission of an act of bankruptcy specified in that section, although it may be involuntary in the sense of not being voluntary under section eleven. Where it is not involuntary in the sense of section thirty-nine, the adjudication may be asked on the ground that the members of the copartnership are unable to pay all their debts, provided the petition is presented by a copartner, as to whom the court to which it is presented has jurisdiction. Yet the copartner petitioning may be unable to pay all his debts, and his copartners may be able to pay all their debts, and they may have committed acts of bankruptcy under section thirty-nine, and he may have committed no acts of bankruptcy under that section, so that under sections thirty-six and thirty-nine the partners could not be adjudicated bankrupts on the petition of a creditor of the partners, and the copartners of the petitioning partner could not be adjudicated bankrupts on the ground of their inability to pay their debts. This would give rise to a case of a copartner petitioning to have himself adjudged bankrupt because of his inability to pay his debts, and to have his copartners adjudged bankrupts because of the commission by them of some act of bankruptcy specified in section thirty-nine.

These various phrases are, in my opinion, provided for by section thirty-six, taken in connection with section eleven and supplemented by General Order XVIII. Section thirty-six provides that "if such copartners"—that is, copartners in trade who are sought to be adjudged bankrupts on the petition of themselves, or any one of them, or of any creditor of theirs—"reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." This provision implies that the court which first obtains jurisdiction over the subject matter of the petition, and over the person of the petitioner, shall have exclusive jurisdiction over the case; that is, over the subject matter of the petition, and over all the copartners if the non-petitioning copartners be brought in by appropriate process.

The objections to the jurisdiction of the court are overruled, and the case will stand for hearing on the other specifications.

F. N. BANGS, for bankrupt.

SEWELL & MCCALMON, for opposing creditors.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where a plea in abatement sets up that the writ, issued in an assumpsit by assignee to recover money paid by bankrupt by way of preference, does not show jurisdiction, and that in point of fact there is none because proceedings in bankruptcy are pending in another district, writ does not allege that any bankruptcy proceedings are pending within this district, but it will be presumed that plaintiffs were appointed assignees in the other district, for otherwise they would have taken issue on the plea.

Held, that jurisdiction is only vested in the courts of the district in which bankruptcy proceedings are pending for the adjustment and collecting of matters arising therefrom, and for such suits as this one. The United States district court of Rhode Island cannot entertain this case because proceedings were begun in the State of Massachusetts.

(Opinion as to commencement of bankruptcy proceedings in different districts in favor of such proceedings, and opposed to the decisions of both Justice Hall and Blatchford, but nevertheless believed consonant with the intent of the framers of the bankrupt act.—ED.)

SHERMAN et al., v. *BINGHAM et al.*

Assumpsit by assignees to recover money alleged to have been paid by the bankrupts to the defendants by way of preference. A plea in abatement sets up that the writ does

not show jurisdiction in this court, and that in point of fact there is none, because the proceedings in bankruptcy are pending in the district court of Rhode Island.

C. T. RUSSELL and H. W. SUTER for defendants. The first and second sections of the bankrupt act confer jurisdiction of actions between the assignee and persons claiming an adverse interest upon the circuit and district courts of that district only in which the proceedings are pending. *In re* Richardson, 2 N. B. R. 74. The writ does not allege that the proceedings are pending here, and as the district courts have only the special jurisdiction conferred by the statute, all necessary averments must be made on the face of the record, or the action will be abated or dismissed.

E. P. BROWN for the plaintiffs. It is highly important that the district and circuit courts should take jurisdiction in such cases as this, in order to preserve uniformity in the construction of the act. The language of the statute is broad enough to cover this case.

LOWELL, J.—I must assume the fact that the plaintiffs were appointed assignees in Rhode Island, because if it were otherwise they should have taken issue on the plea; but that there may be no miscarriage, they may do so within one week, if the plea should be adjudged valid. The cases cited by the defendants, and one other carefully considered case by Dillon, J., (*Markson* v. *Heaney*, 3 C. L. N. 153,) decide that the circuit and district courts of districts other than that in which the proceedings in any bankruptcy are pending, have no jurisdiction in equity to carry out the provisions of the bankrupt law in aid of these proceedings. The decision of Mr. Justice Story in *exp.* Martin, 5 Law Rep. 158, in which this auxiliary jurisdiction was affirmed, does not appear to have been cited in the discussion of either of these cases. That eminent jurist exhibits with great force the convenience which will be promoted by the exercise of such a power, and concludes that section six of the act of eighteen hundred and forty-one is broad enough to confer it. The clauses on

which he relies as conferring a general jurisdiction are those which open and close the grant of power, viz.: "The district court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act" * * * "and to all matters and things done and to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy," he holds that the intermediate grant of power in particular cases is affirmative only and not restrictive. The learned judge does not refer to section eight, which gives the circuit court for the district where the decree of bankruptcy is passed concurrent jurisdiction with the district of all suits at law and in equity by and against the assignee. He confesses to great doubt as to the true construction of the act, but on the whole upholds it. Judge Prentiss afterwards followed the decision in *exp.* Martin, relying wholly upon it as authority for his action, though it is evident that he had his own doubts upon the question. *Moore* v. *Jones*, 23 Vt., 739, 746.

Exp. Martin having been decided upon a different statute, and one which, though it is hardly to be distinguished from that of eighteen hundred and sixty-seven upon this point, does yet differ from it in some particulars, does not bind by judgment absolutely, and I shall therefore consider the case anew. And I am constrained to say that it seems to me that sections one and two of the act of eighteen hundred and sixty-seven grant jurisdiction only to those circuit and district courts of the district in which the petition in bankruptcy is filed.

Authority is undoubtedly given as under the former law, to hear and adjudicate upon all matters and proceedings in bankruptcy; but if this gives jurisdiction to all federal courts of suits by and against assignees, without reference to the *venue* of the bankruptcy, it is very difficult to see why the district courts have not jurisdiction of all bankruptcies without reference to residence or place of business of the bankrupt.

The qualification immediately added after the grant to hear and adjudicate, viz.: "according to the provisions of this act," refers us to section eleven, by which we find that the proceedings must be where the debtor resides or carries on his business; and so, when we look to section two, we find the supervisory power of the circuit court is only over cases and questions "within and for the district where the proceedings in bankruptcy shall be pending." And the concurrent jurisdiction of such suits as the present, "in the same district," evidently means the district in which the proceedings are pending. This is so understood by Judge Dillon in the case above cited, and I see no other reasonable construction of the words. The corresponding section (eight) of the law of eighteen hundred and forty-one, is so, as we have seen, and I have never heard a doubt expressed of the correctness of this interpretation.

It may not be amiss to repeat that section six of the act of eighteen hundred and forty-one differs a little from section one of that of eighteen hundred and sixty-seven in this: the earlier law gives jurisdiction to the several district courts of all matters and proceedings in bankruptcy, arising under the act or under any other that may afterwards be passed—a very comprehensive form of expression. The present law says they shall have jurisdiction in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same, according to the provisions of this act. Then, as we read on through the section, we find the marshaling of assets and many other proceedings specially mentioned, but all with reference to a bankruptcy supposed to be pending before that court. Judge Story, as we have seen, considered similar provisions in the law of eighteen hundred and forty-one as cumulative only, but it seems to me much more logical to construe the first section throughout as giving the most ample powers to the district courts to conduct and settle the proceedings in bankruptcy; but that it does not relate to suits at law or in equity between the assignee and third persons, which are regulated by section two.

It was the practice under the former acts to call upon the court by summary petition to dispose of all these rights; but the better opinion is, that under the act of eighteen hundred and sixty-seven the assignee must bring his action at law or in equity, as the nature of the case may require; and I understand the supreme court, at this term, to have recognized this as the true practice. If so, it is because such actions depend on section two, and not on the summary processes mentioned and implied in section one. Now, we have already seen that section two confines the jurisdiction of suits to the courts of the same district where the bankruptcy is pending. Upon the whole, therefore, I am of opinion that the true meaning of the law is that I have jurisdiction of such actions as this only when the bankruptcy is here. And I find in the decisions under this law, authorities which may properly be considered as balancing that of *ex parte* Martin, and leaving me free to follow my own judgment. I should be glad to have the point taken to the circuit court for review. I may properly say that I should not regret to have my decision overruled, because I can see that there may, in the long run, be much convenience in bringing these cases in the federal courts, or in having the right to bring them there. Still I cannot admit that there is likely to be a failure of justice without it, because the state courts must deal with all titles depending upon bankruptcy precisely as the courts of the United States do, and must look to the supreme court at Washington as the ultimate arbiter of all doubtful points arising under the law. In point of fact, the larger part of such suits arising in Massachusetts are now brought in the state courts, unless I am misinformed, and it is probable that the practice will continue, because the forms and modes of proceeding are more familiar to the bar, and the courts are nearer at hand. If this court should absorb the whole of this jurisdiction, it is not certain that a trial could always be had in every case at the first term, as is now entirely feasible if the parties desire it. Another suggestion I will make for what it may be worth. It is possible that in a case such as this ap-

pears to have been in its origin—that is, where partners who live in different districts become bankrupt, proceedings could so far be taken in each district as to give the court jurisdiction. I do not know that this experiment has ever been tried, and I give no opinion on the point.

The plea must be adjudged good, and the suit will be dismissed, without costs, for want of jurisdiction, unless the plaintiff amend by taking issue on the plea within ten days. They can take exceptions to my ruling within the same time, if so advised.

U. S. DISTRICT COURT—MASSACHUSETTS.

The bankrupt's wife may prove as a creditor against his estate in bankruptcy, for money realized by him out of property which she held as her separate estate under the statutes of Massachusetts, if the evidence clearly shows that the transaction was intended to be a loan and not a gift.

In re E. G. BLANDIN.

This was a petition by the wife of the bankrupt for the allowance of a claim against his estate for property loaned by her to him, with a promise made by him at the time of the loan that he would repay her. The property consisted of stock and money in savings banks to the amount of two thousand dollars, which the wife received as a distributive share from her mother's estate. With this the husband bought out a grocery store in Taunton, and after carrying on business about a year he failed. The question whether such a claim could be proved against the estate of the husband in bankruptcy was argued some time since.

LOWELL, J.—The statute of Massachusetts gives married women power to contract concerning their separate property and to sue and be sued in all matters relating to the same, as if they were sole. Gen. Sts. ch. 108, sections one to six. In this respect the act may be said to be declaratory of the rules before adopted by courts of equity, though going much further in ascertaining what shall be considered separate

property. This statute does not give any right to husband and wife to contract with each other or to sue each other at law. *Lord* v. *Parker*, 3 Allen, 327; *Edwards* v. *Stevens*, Ib. 315; *Knowlton* v. *Hall*, 99 Mass. 564. The bankrupt, therefore, having borrowed of his wife the money and personal property from which money was realized, the contract to repay it could not be enforced at law. And it is generally true that a contract void at law is void in equity. To this general rule there are well-known exceptions, one of which is a contract between husband and wife concerning her separate property, which courts of equity will uphold and enforce. In this way a wife may become the creditor of her husband. *Fenner* v. *Tayloy*, 1 Sim., 169; *Tower* v. *Hagner*, 3 Whart., 48; *Riley* v. *Riley*, 25 Conn., 154.

I do not understand that it has ever been decided in this Commonwealth that these doctrines do not fully apply in equity to separate property held under the statute. It seems to me that the statute merely enlarges the field for the application of these doctrines; and I apprehend that, if a husband should possess himself of his wife's property, whether by force, by fraud or by virtue of a contract to repay it, very little difficulty will be found in discovering a remedy. The cases of *Turner* v. *Nye*, 7 Allen, 178, and *Phillips* v. *Frye*, 14 Allen, 36, differ essentially from this case, because in neither of them was the property the separate estate of the wife; if it had been, I venture to think that the former case would have been decided in favor of the wife, although the latter might have been embarrassed by the want of full equity powers in the courts of probate. The turning point in both those cases was that the property not being separate, there was no valuable consideration for the promise, an objection equally fatal in equity as at law. In this I may be mistaken; but if so, it is not upon any question of the local law, but of the application of general rules of equity to that law, which is a point I should be obliged to decide for myself in any event. And my opinion is that in equity the petitioner has a right to be repaid out of the husband's estate, whether it be called an equitable debt or a trust.

Whether in any given case the wife has such an equitable claim, is a question of fact. If she has permitted him to use her money, and especially her income, for a long course of years, the presumption of a gift is almost irresistible, and if a gift, she cannot recall it. *Caton* v. *Rideout*, 1 McN. & G. 599; *Gardner* v. *Gardner*, 1 Giff, 126. If, on the other hand, he obtained the money without her consent, or on a promise to hold it as a trustee or to repay it, he must do so. *Rich* v. *Cockell*, 9 *Ves.*; *Darkin* v. *Darkin*, 17 *Beav.* 578; *Rowe* v. *Rowe*, 2 De G. & S. 294; *Walker* v. *Walker*, 9 Wall, 743. In this case the evidence shows that the money realized from the wife's separate personal property was to be repaid.

Under these circumstances the wife claims the right to prove for the amount against the husband's estate in bankruptcy, or that the court, under its equitable powers, should order such a sum as may be just to be paid out to her by way of settlement. The case does not come within the latter alternative. There is no *chose in action* or fund in existence, with which a court of equity can deal; the money has gone into the mass of the husband's assets, and the petitioner must come in as a general creditor, or not at all. That she or her next friend may prove as a creditor was held *in re* Bigelow, 2 N. B. R. 170; *ex parte* Wells, 2 Mont. D. & DeG. 504; *ex parte* Thring, Mont. & Ch. 75. It is very doubtful whether such a debt could have been proved under the insolvent law of Massachusetts, for that law was considered to refer only to legal debts, *Robb* v. *Mudge*, 14 Gray, 540; but I have little doubt that equitable debts are within the scope of the bankrupt act. It seems to me to be the intent of that statute to give all creditors an equal share of the assets without regard to the mode in which their rights might have been enforced if there had been no bankruptcy; and that the debtor should be discharged from all debts and demands which are liquidated or capable of liquidation. In respect to both debtors and creditors the act is highly remedial, and the district court is vested with most ample equitable powers to enable it to work out full remedies to all persons. It has

always been the law of England that equitable demands may be proved in bankruptcy. *Ex parte* Williamson, 2 Ves. (Sen.) 252; *ex parte* Taylor, 1 Rose, 175. "A commission in bankruptcy," said Lord Eldon, "is nothing more than a substitution of the authority of the lord chancellor, enabling him to work out the payment of those creditors who could by legal action or equitable suit have compelled payment." *Ex parte* Dewdney, 15 Ves. 498. The nineteenth section of our statute makes provable all debts and liabilities, in language broad enough certainly to cover such as a trustee owes to his *cestui que trust*, or a partner to his copartner; and so of demands which, but for the bankruptcy, would be properly cognizable in a court of admiralty. If this be not so, I do not see how the law can be uniform, for proof of debts will depend on the remedies given in the several states, in one of which the very same debt might be sued at law which in another must be prosecuted in equity, and in some of which there is no distinction between law and equity.

The twenty-fourth section provides that a creditor who appeals from the rejection of his claim, shall file a statement in writing, setting forth the same substantially as in a declaration at law, and that like proceedings shall be had as in an action of law. This section, perhaps, is the one on which a doubt is raised. But the provision here seems to be made for the ordinary case. It is very seldom that a debt is offered for proof, that could not be sued at law; and in this section, if it is to be taken literally, this very rare case is overlooked. But there is no sort of doubt that the circuit court has full appellate power, and that it may take such order in relation to appeals not fully provided for by section twenty-four as may be necessary to conform the proceedings to the nature of the case. It was not at all the purpose of that section to prescribe what debts might be proved, but merely the mode of conducting appeals; and it is, therefore, but slightly and incidently that it supplies an argument for any construction of section nineteen.

The real difficulty in these cases is found in the evidence.

There is great danger of fraud and mistake, and all demands of this sort must be examined with the utmost care. If on such examination the case is fairly made out, I have no right to disregard well-settled rules of equity, which declare and uphold the wife's right to recover.

Mrs. Blandin is admitted as a creditor for two thousand dollars, the sum advanced, without interest, the evidence showing no contract for interest.

C. A. and G. M. REED, for the petitioner.

J. H. DEAN, for the assignee.

U. S. DISTRICT COURT—S. D. NEW YORK.

Where nearly all the debts against a bankrupt copartnership, comprised of three copartners, have been purchased in the interest of two of the copartners, by two of their friends to whom the money for such purchase was furnished by those partners, the third partner not contributing, objects to the proof of the purchased claims as illegal, although it is not denied but that they were originally *bona fide* claims against the copartnership.

Held, that a decree will be entered providing for the payment in full, by the assignees, of the unpaid and unpurchased proved debts, with interest;

For the payment into court of the amount of the unpaid unproved debts, with interest;

For the payment of the commission of the assignees, and the charges, fees, disbursements and expenses of their attorney and counsel, and the fees of the register and clerk, for the payment to the two purchasers (friends of two of the bankrupts) of the amount paid out by them in the purchase of the copartnership debts, together with interest.

For the transfer of the remainder of the estate by the assignee to the bankrupts, jointly by proper instruments.

In re LATHROP et. al.

BLATCHFORD, J.—I am still of the opinion stated by me heretofore in this case (*in re* Lathrop, 3 N. B. R. 105), that the claims proved by Prescott and those proved by other persons and since purchased by Prescott, for the reason that he acted for the bankrupts in purchasing such claims, and that such claims must therefor be rejected as illegal. This view extends to all the claims now shown to be held in the name of Prescott, and to those now shown to be held in the name of Mr. Hawkins; but the light in which I was considering the claims when they were before me on the previous occasion, and the view thus then stated and now restated in regard to

all such claims, both those in the name of Prescott and those in the name of Mr. Hawkins, regarded and regards the position and rights of the holders of the claims only as between themselves, as agents or their real principals, the bankrupts and such *bona fide* creditors of the bankrupts as had not parted with their claims by transfering them in the shape of a sale to Prescott, or some other person acting for the bankrupts. It now appears that aside from the claims so held by Prescott and by Mr. Hawkins, the unpaid proved debts amount to only two hundred and thirty-one dollars and eighty cents, and the unpaid unproved debts to only ninety-three dollars and thirty-seven cents, and that the assets in the hands of the assignee in bankruptcy are ample to pay such debts in full; while, therefore as between the estate in the hands of the assignee and the *bona fide* unpaid creditors of the bankrupts, the claims held by Prescott and Mr. Hawkins could not come in as the claims of creditors for a dividend until all the claims proved by *bona fide* unpaid creditors should be fully paid, yet when such last named claims and all the unpaid unproved debts are disposed of, as is now practically the case, the question on the evidence now before me is a very different one. I am now called upon to distribute the surplus assets of the bankrupts among themselves, or to transfer such assets to the bankrupts. The question comes up on a petition by Lathrop, one of the bankrupts, that the claims held by Prescott and Mr. Hawkins be disallowed and rejected, and that he be allowed his share of the estate, or that the estate be assigned by the assignee to him jointly with the other two bankrupts, his former partners, Cady & Burtis. If he is to enjoy the benefit of the rejection of the claims held by Prescott and Mr. Hawkins, as claims to their full amounts against the estate, he must take such benefit *cum non*. Such claims amount on their faces to one hundred and five thousand and twenty-three dollars and eighty-four cents. He repudiates having had anything to do with the purchase of such claims, and has alleged and proved that what has been done towards purchasing them has been done

wholly by Cady & Burtis, through the agency of Prescott and of Mr. Hawkins. The money that was raised to purchase the claims was put into the hands of Prescott, to the extent of sixty-two thousand, three hundred and fifteen dollars and eighty-one cents; and into the hands of Mr. Hawkins to the extent of fifteen hundred and sixty-four dollars. With the former sum Prescott purchased claims to the amount of one hundred and three thousand, four hundred and nine dollars and eighty-four cents; and with the latter sum Mr. Hawkins purchased claims to the amount of one thousand six hundred and fourteen dollars. These claims, before they were so purchased, were all of them *bona fide* debts against the bankrupt, for which Lathrop was liable. By their rejection he is to be freed from the amount of indebtedness which they represent. It is not equitable that he should be so freed without contributing his share of the money which went to satisfy the creditors who held the claims. Prescott and Hawkins represents those who furnished such money, whoever they were. The amounts paid by Prescott and Mr. Hawkins for the claims, must be refunded to them, as an equitable claim against the estate in the hands of the assignees, before such estate can be distributed among the bankrupts or turned over to them. In this regard Prescott and Mr. Hawkins may be considered as subrogated to the rights of the creditors who assigned to them to the extent of the moneys they actually paid to such creditors, and the claims may be considered as valid in their hands to the extent of the moneys they so paid with interest. A suit for an accounting in repect of the partnership affairs of the bankrupts, as between themselves, is pending in a court of the state. That is the proper tribunal to superintend and enforce such accounting. The pleadings in such suit have formal shape, and the rights of the partners, as respects each other, will not be adjudicated as the out-branch of a proceeding in bankruptcy. The assignees in bankruptcy are entitled to be relieved, as soon as possible, from their tedious and troublesome, and acrimonious contest among these part-

ners, and to depart without day when all the creditors of the bankrupts depart.

A decree will be entered providing for the payment in full by the assignees of the two hundred and thirty-one dollars and eighty cents of unpaid proved debts, with interest. For the payment into court of the ninety-three dollars and thirty seven cents of unpaid unproved debts, with interest. For the payment of the commission of the assignees, and the charges, fees, disbursements and expenses of their attorney and counsel, and the fees of the register and clerk. For the payment to Prescott of the sixty-two thousand three hundred and fifteen dollars and eighteen cents, with interest; and to Mr. Hawkins of the fifteen hundred and sixty-four dollars, with interest. For the transfer of the remainder of the estate by the assignees to the bankrupts, jointly, by proper instalments.

GEORGE WILCOX, for Lathrop.

DEXTER A. HAWKINS, for himself and Prescott and Cady and Burtis.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

[Before JOHN FITCH, Register.]

A register has the right to allow amendments to the schedules on the *ex parte* application of the bankrupt, at any time while the cause is pending before him, but it is the better practice, if there shall have been an appearance on the part of creditors, to issue an order to show cause, &c., and to require due notice of such application to be given.

It is the duty of the bankrupt to amend his schedules so as to make them conform to the facts, and that the filing of specifications does not deprive him of that right or release him from that duty.

The register should allow all necessary and proper amendments whenever a proper cause therefor is shown.

In re B. HELLER.

Upon affidavits and upon all the pleadings and proceedings in this cause, the bankrupt moves to amend schedule A attached to his petition for adjudication in bankruptcy, by striking out certain debts which were inserted in a previous amendment through a mistake of the law, the debts having

been contracted by the bankrupt since the filing of his petition.

Since the adoption of the code of procedure by the legislature of this state, amendments to any pleadings or proceedings are allowed virtually as a matter of course, and are within the discretion of the court, and being allowed whenever proper cause is shown. Sections 172, 173 and 174, of the Code.

The practice of the state courts under section one hundred and seventy-three of the code, which section of the code is as follows: "The court may, before or after judgment, in furtherance of justice and in such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved," has been settled by the following decisions: Amendment before trial, matter of course, *Troy & Boston R. R. Co.* v. *Tibbetts*, 11 How. 170; *Dagurre* v. *Orser*, 3 Abb. 86. Reasonable excuse for defect sufficient, *Huntington* v. *Slade*, 22 Barb. 164, see further, *Merchant* v. *N. Y. Life Ins. Co.*, 2 Sand. 659; 2 Code Rep. 66 87; *Chapman* v. *Webb*, 1 Code Rep. U. S. 388. Summons may be amended after judgment, *Sluyter* v. *Smith*, 2 Born. 673; see also 13 How. 287. Affidavits may be amended, 13 How. 350. A warrant of attachment may be amended, *Kissam* v. *Marshall*, 10 Abb. 424. Where amendment is in furtherance of justice, but little restriction upon power of amendment, *Van Ness* v. *Bush*, 14 Abb. 36; *Beardsley* v. *Stover*, 7 How. 294; 3 Abb. 86. Court will allow amendment of complaint necessary to conform it to the facts proved, *Hunter* v. *Hudson River Iron Co.*, 2 Barb. 493. By section one hundred and seventy-four of the code of procedure, whenever any proceeding taken by a party fails to conform in any respect to the provisions of this code, the court may, on motion, permit an amendment so as to make it conformable thereto.

The motion to amend is properly made. General order V; *in re* Morford, B. R. Sup. xlvi; *in re* Perry, 1 N. B. R. 2; *in re* Little, 1 N. B. R. 74; *in re* Watts, 2 N. B. R. 145. The bankrupt is required by the bankrupt act of March 2, 1867, to make his petition and schedule conform to the provisions of the law, *in re* Orne, B. R. Sup xviii. And the court has authority to allow amendments to be made at any time prior to the discharge of the bankrupt. General order V.

"He shall be at liberty from time to time, upon oath, to amend and correct his schedules of creditors and property, so that the same shall conform to the facts." United States bankrupt act, section 26; *in re* Jones; 2 N. B. R. 20; *in re* Orne, B. R. Sup. xviii. In the last cited case BLATCHFORD, J., says: "An error, whenever discovered, must be corrected, no matter what proceedings have theretofore taken place." "The register may order schedule to be amended at any stage of the proceedings." *In re* Perry, 1 N. B. R. 2. Additional amendments were allowed after the assignee had made and filed his report. I entertain no doubt of the right of the bankrupt to amend under section twenty-six, nor of the application being properly made to the register.

A bankrupt may amend schedules even after the hearing of specifications against the discharge, *in re* Preston, 2 N. B. R. 27. In this cause leave to amend was granted by the register under section twenty-six of the act, and general orders five, seven and thirty-three. Schedule A was amended by the addition of about twenty-five creditors, among these were included the names of eight persons, the indebtedness to whom was subsequent to filing of the petition. As the discharge, if granted, could not release the petitioner from debts contracted after the filing of his petition, those creditors whose names were improperly inserted could suffer no loss or damage by the mistake. They had not proved or attempted to prove their debts, and the proceedings have not been effected in any way by their names being inserted in the amended schedules. The bankrupt, on becoming aware of the error, seeks to correct it by striking out those names from his amend-

ed schedule, and asks leave to amend by filing an amended schedule omitting the names of those eight creditors whose names were by mistake placed in the amended schedule. The mistake of placing the names of creditors whose claims did not exist previous to the filing of the petition, on the amended schedule, not having prejudiced a right of any previously existing creditor, and being, in effect, the asking of a relief which the court has no power to grant, is merely surplusage and the last proposed amendment, which is for the purpose of removing manifest imperfections, is an act of good faith, and the court should not merely permit the amendment, but require it to be made.

The bankrupt, on making his motion for leave to amend, states, "under oath, the substance of the matter proposed to be included in the amendments" &c., as required by general order No. thirty-three. It is not reasonable to suppose this rule was intended to restrict amendments to cases of omission. Section twenty-six of the act, and general orders five and seven, are not susceptible of any such construction.

The register has power to allow amendments, and no creditor has a right to oppose such application. *In re* Watts, 2 N. B. R. 145.

In re Ratcliffe, 1 N. B. R. 98, an amendment was allowed on condition that there should be a new warrant issued, &c., which was necessary under the circumstances of that case. So also *in re* Perry, 1 N. B. R. 2, additional proceedings were considered necessary. *In re* Morford, Blatchford, J., I consider as settling the practice as applicable to this case, B. R. Sup. xlvi. The register, holding chambers of the district court, either upon his own motion or upon application of the bankrupt or a creditor, or any other person having a standing in court, can make an order allowing such amendments as may be proper. The proceeding is *ex parte*, and is entirely within the discretion of the register to grant or refuse it; if applied for by the petitioner, no notice thereof is required to be given to any one, neither has a creditor a right to oppose it. Should the register refuse to allow

the amendments, the petitioner has a right to appeal to the special term. Whenever any bankrupt or creditor shall make a motion before the register, at chambers, to amend the schedules or to compel the petitioner to amend his schedules, I hold the better practice to be to issue an order requiring the party to show cause why the amendments as asked for should not be allowed, specifying particularly the points in which the schedules are defective. The bankrupt or creditors will then have a right to oppose the application, and appeal from the order at chambers to the special term if dissatisfied with the decision of the register. The authorities on these points are, *in re* Hill, B. R. Sup. iv; *in re* Orne, B. R. Sup. xviii; *in re* Jones, 2 N. B. R. 20; *in re* Levy, B. R. Sup. xxx; *in re* Patterson, B. R. Sup. xxii; *in re* Morford, B. R. Sup. xlvi; *in re* Watts, 2 N. B. R. 145.

The foregoing decisions are the same, in spirit, as to the allowance of amendments as are the decisions of the courts of this state, the same liberal spirit prevailing in each; allowing amendments as a matter of course in the discretion of the court, appeals being allowed in all proper cases.

In this state the courts have, for a long series of years, allowed the most liberal amendments in all pleadings and proceedings, allowing all necessary amendments in pleadings, before, on and after the trial of causes; no one has opposed, and the bar of the state generally approve of the practice. The act of congress requiring the national courts to follow the practice of the state courts in certain particulars, in the districts in which the United States courts are being held, enables the two courts to assimilate their practice, and enables the United States courts to avoid much of the English common law practice descended to us from the Roman law. In bankruptcy proceedings, it is in furtherance of the ends of justice and as contemplated by the bankrupt act, that the register holding the chambers of the district court, and acting as an United States district judge, clothed with his powers in regard to the case before him, should make all necessary orders in the case. As the registers selected by

Chief Justice Chase and approved by the district courts are with few and unimportant exceptions men of the highest order of legal talent, learned in the law, having a full practice in the state courts, standing high in their respective communities—many of them having had legislative and congressional as well as judicial experience—to such men all the workings of the bankrupt law can safely be trusted; they are, as it were, a class of judicial pupils composing a school for judges, constantly increasing their fund of judicial knowledge, acquiring that practice and experience most fitting and qualifying them for judges of our state courts, and promotions to district or circuit judges of United States courts.

The opposing creditors, by their counsel, submit the following objections to the granting of the bankrupt's motion:

First. "There is no justification in law for the exercise of such power or discretion by the register at this stage of the proceedings."

Second. "The functions of the register have been performed with the exception of filing the specifications." General orders six, seven, twelve, twenty-four and twenty-nine.

Third. "The case was *de jure* remanded to the court after the filing of the specifications."

Fourth. "The register has no jurisdiction in the premises. He is limited to granting amendments for omissions in the schedules, and leave to amend in uncontested cases." General orders five, seven and thirty-three.

Fifth. "It is for the court, and the court alone to decide upon motion for leave to amend in contested cases; the filing of specifications is decisive of the question whether a case is contested or not. The motion should have been addressed to the court."

Sixth. The register has already certified that said petition and schedule are correct in form, as it was his bounden duty to do so according to rules four and seven."

Seventh. "It is claimed by the opposing creditors in the specifications, that the matter sought to be amended or withdrawn is evidence of both fraud and perjury under the law."

Upon a careful examination of the views presented by the counsel for the bankrupt, and also of the opposing creditors and the authorities cited, I do not find any which support either of the objections of the opposing creditor. The objection taken that the mere filing of the specifications deprives the bankrupt of his right to the amendments, is not, in my opinion, sustained by the bankrupt law, or by the rules or practice of this court, as the bankrupt act, by section twenty-six of the act, provides, "That the bankrupt shall be at liberty, from time to time, to amend and correct his schedules of creditors and property so that the same shall conform to the facts;" and for the purpose of such amendments the register is the court, and has the power to grant them, on motion, *ex parte*, and that any politeness or courtesy shown to counsel for creditors out of personal respect by the register, who was willing that they should be heard in order that their views might be presented to the court, does not bring the cause within the rule of that portion of the bankrupt act defining contested cases, and that this application is *ex parte*, and not in any respect a contested case.

The mere filing of the specifications does not, *ipso facto*, adjourn the cause into court, or oust the register of his jurisdiction of the cause. The filing of the specifications is a mere incident to the opposition to the bankrupt's discharge, by a statement of the reasons why a bankrupt should not be discharged. He, (the register) proceeds with the cause notwithstanding the specifications, until his duties are performed. *In re* Puffer, 2 N.B. R. 17, HALL, J. decides that if the creditor desires an examination of the bankrupt with a view of using such examination in opposing the discharge, or for any other purpose, he can proceed under district court rule twenty-six, (northern district of New York), such proceedings retain the cause before the register until the testimony shall have been taken; any creditor having a standing in court has a right to have such examination of the bankrupt or any other persons as witnesses. *In re* Adams, 36 How. 51.

Creditors who have proven, or attempted to prove their claims, although not as yet allowed by the register, are entitled to have an order for such an examination. B. R. Sup. xliii; 36 How.. 51; Bump on bankruptcy, 64; bankrupt act, section 19; general order III.

1st. Upon all the proceedings in this cause, including the specifications, I decide as a matter of law that this applica-

tion of the bankrupt, in form of a motion to amend his schedules, is one that he has a right to make *ex parte*, and that neither the assignee nor opposing creditors have a right to be heard upon the motion or to oppose the same, but that it is better practice, in order to bring the question fully before the district court, to allow them to do so, and to require due notice of such application to be given.

2d. That the bankrupt has a right to amend his schedules by striking out the names of the eight persons who have become creditors of the bankrupt since the filing of the petition and schedules.

3d. That in this case it was the duty of the bankrupt to amend his schedules, so as to make them conform to the facts, and that he could make such application at any stage of the proceedings before the register had returned the cause to the court, and that the filing of the specifications did not prejudice him in, or deprive him of this right.

4th. That the register has the right to grant an order allowing such amendments whenever a proper cause therefore is shown. This being a proper cause, and the causes shown are in my opinion sufficient, the motion of the bankrupt is granted.

5th. The opposing creditors, by Henry Morris, their attorney, object to the granting of the order, and request a certificate to the district court.

Benjamin Todd, for bankrupt.

Henry Morris, for opposing creditors.

Blatchford, J.—I concur in the views of the register stated in his conclusions one, two, three and four.

U. S. DISTRICT COURT—S. D. NEW YORK.

Where a counsel for petitioning creditors obtains an adjudication, and performs other services incident to the bankruptcy proceedings, but it does not appear that he has in any way recovered property fraudulently conveyed to, or possessed of, by creditors, and the assets of the estate amount to about the sum of fifteen thousand dollars, an allowance of one thousand dollars made to the counsel for petitioning creditors, by the register before whom proceedings are pending, is too extravagant, and will not be confirmed unless assented to by the assignee, the bankrupts and all the creditors who have proved their debts.

In re SANGER & SCOTT.

It having been referred to me to take the testimony upon the services that have been performed herein by the counsel for the petitioning creditors, and also to tax the disbursements actually and necessarily incurred herein, and also to report on proof what counsel fee should be reasonably allowed said counsel for his services in obtaining said adjudication in view of the amount of assets in the hands of the assignee, and to report the same with my opinion thereon to the court, do respectfully report as follows:

That on the twenty-first and twenty-second days of April, eighteen hundred and seventy, the counsel for the petitioning creditor and his witness attended before me. The assignee, Rich. Warren, Esq., being present on the first day, and having heard the testimony as to the amount of assets, and not dissenting therefrom.

That I took the testimony of said counsel and witness; and that by said testimony it appears that the counsel performed considerable service in those proceedings, being occupied daily in said proceedings for some time. That the said services were reasonably worth, in view of the assets being at least fifteen thousand dollars, the sum of one thousand dollars, and I therefore, upon said testimony, do report that in my opinion the sum of one thousand dollars would be a reasonable amount to allow said counsel for his services herein, in and about the obtaining of said adjudication, and I do further report that I have taxed the costs and disburse-

ments actually and necessarily incurred herein, and that the sum amounts to one hundred and sixty-eight dollars and seventy cents. All of which is respectfully submitted.

JOHN FITCH, *register*.

BLATCHFORD, J.—The one thousand dollars is too extravagant. I cannot allow it unless the assignee and the bankrupts and all the creditors who have proved their debts assent in writing.

April 24, 1871.

BILL OF COSTS AND DISBURSEMENTS IN THE ABOVE CASE.

1871.	Docket fee	$20	00
February 24.	Paid clerk's fees on filing petition	9	40
" 25.	Paid certified copy order of injunction	2	50
March 3 & 4.	Affidavits		75
" 6.	Certified copy order of reference	1	60
" 3.	" " " adjudication	1	60
" 18.	Clerk and register's fees on warrant	58	55
" 25.	Commissioner's fees	10	50
" 25.	Printed notices	10	00
" 29.	Postage	1	75
" 29.	Affidavits		25
" 30.	Paid copy order of sale for Toffeng	1	60
" 31.	" " " Wilmerding, Hoguet & Co.	1	60
	Register's bill for affidavits, orders, summons, testimony of witness and day's examination.	32	00
	Attending on order of reference as to counsel fee, report, affidavit and listening	15	00
	Total	$168	70

Alex. Bhemensteel being duly sworn says that he is attorney for the petitioning creditors herein, that the foregoing disbursements have been actually and necessarily incurred herein.

A. BHEMENSTEEL.

Sworn to before me, this twentieth day of April, eighteen hundred and seventy one.

JOHN FITCH, *Register*.

Golson et al. v. Neihoff et al.

U. S. DISTRICT COURT—N. D. ILLINOIS.

Where a creditor who has been carrying and renewing a note, enters up judgment by virtue of a warrant of attorney attached, and issues execution, the debtor having, three days before, absconded, leaving his property and creditors unprotected, the business community and newspapers being in speculation as to his departure and means, and the creditor having come to the conclusion that "there was something wrong," and that his interests as well as those of the surety on the note require that judgment should be entered, he obtains such a preference as is avoided by the thirty-fifth and thirty-ninth sections of the bankrupt act.

The simple fact that a man doing a large business, pays under special circumstances a large discount for a loan, is not notice of insolvency to the creditor, it being shown that at the time similar commercial paper was selling at high rates.

The preference upon a judgment note is not obtained when the warrant of attorney is given, but when the judgment upon it is entered.

If, at the time of the entry of judgment, the creditor has knowledge of his debtor's insolvency, or notice of such facts as make it reasonable to believe him insolvent, he is guilty of intending a fraud upon the act. And where he thus executes the dominant power, such entering of judgment is an act of bankruptcy, participated in by the creditor, and all advantages obtained under it are in violation of the law.

It is not a sufficient answer to say that the warrant of attorney was given to secure a *bona fide* debt, and that at the time the creditor has no knowledge of his debtor's insolvency. The question depends upon the knowledge or information which the creditor had at the time he made his warrant operative.

GOLSON et al. v. *NEIHOFF et al.*

BLODGETT, J.—This is a summary proceeding by petition by the trustees of the estate of Adam Baierle, setting forth in substance that in January, eighteen hundred and sixty-nine, said bankrupt borrowed of the respondents, Neihoff & Co., five thousand dollars, for which he gave his promissory note, with one Hoffman as surety, payable to said Neihoff & Co. in four months; that said indebtedness was extended by agreement from time to time between the parties, until the twelfth of November, eighteen hundred and sixty-nine, when Baierle paid respondents one thousand dollars, and obtained a further extension of sixty days on the remaining four thousand dollars; and on the twelfth of January, eighteen hundred and seventy, the further sum of one thousand dollars was paid to respondents, and an extension for sixty days given for the remaining three thousand dollars; that on the ninth of October, eighteen hundred and sixty-nine, Baierle borrowed

of respondents the further sum of one thousand dollars, for which he gave his note, with one Grater as surety, payable to respondents in thirty days, to which said note was attached a warrant to confess judgment, and which note was, on the twelfth of November, eighteen hundred and sixty-nine, extended for the term of sixty days; and on the twelfth January, eighteen hundred and seventy, a further extension of sixty days was obtained; that for all these loans and extensions, large discounts were paid by the bankrupt, amounting to at least two and a half per cent. per month; that at the time said extensions were obtained, said bankrupt was insolvent, and that the facts of his not paying said notes at maturity, and his paying such extortionate and usurious rates of discount or interest, were sufficient to put said respondents on inquiry, and give reasonable cause to believe him insolvent; that on the twelfth day of February, eighteen hundred and seventy, said Baierle was guilty of an act of bankruptcy, and on the fifteenth day of February, eighteen hundred and seventy, a petition was filed in this court to have him adjudged a bankrupt, and that in pursuance of said petition he afterwards was duly adjudicated a bankrupt; that on said fifteenth day of February, respondents caused a judgment to be entered in the superior court of Chicago by virtue of the warrant of attorney attached to said one thousand dollar note, upon which judgment execution was issued and levied on the same day upon certain personal property of said bankrupt, and the property so levied upon was subsequently sold on said execution and said judgment, and costs, amounting in all to one thousand and sixty-eight dollars and seventy-two cents, was fully satisfied thereby. The petition also charges that at the time of the entry of said judgment and the issue of execution, levy and satisfaction thereof, said respondents knew of Baierle's insolvency, and that by said judgment and levy said respondents obtained a preference over the other creditors of said bankrupt contrary to the term and effect of the bankrupt act. The petitioners then pray that said Niehoff & Co. may be ordered and adjudged to pay to them,

as such trustees, all said sums of money so wrongfully received and collected by them from said Baierle.

The respondents by their answer admit the making of said loan to said Baierle, and the receipt of said notes therefor, and the subsequent payment of said sums of one thousand dollars in November and January to apply on the first mentioned note, and the several extensions of said indebtedness, except they deny the extension of said one thousand dollar note on the twelfth of January, eighteen hundred and seventy, for sixty days, but aver that the same was only extended for the term of thirty days; they also denied all knowledge of Baierle's insolvency, and of any facts tending to apprise them of such insolvency at the time said payments were made and extensions granted. They also admit the entry of said judgment, issue of execution, levy and satisfaction thereof, but deny all knowledge of Baierle's insolvency and acts of bankruptcy at the time said judgment was entered. It was also set forth in the answer, and proved on the trial, that after the entry of said judgment said Baierle made his motion in the superior court to set aside said judgment, on the ground that said note had been extended sixty days from the twelfth of January eighteen hundred and seventy, and consequently was not due at the time said judgment was entered thereon, and that said motion was, after due consideration, overruled by said court.

The only question (except as to the time for which said one thousand dollar note was extended on the twelfth of January) upon which proof was offered at the trial, was in regard to the knowledge or motive which Niehoff & Co. had of Baierle's insolvency during the progress of the transactions detailed.

The petitioners relied mainly upon the facts of the extensions obtained by Baierle, and the high rate of interest or discount paid to establish or raise a presumption of knowledge of said insolvency, and the preference by the receipt of the discount, and the two sums of one thousand dollars each, which were paid in November and January on the five thousand dollar note; while on the part of the respondents it was

proved by several business men who had transactions with Baierle up to a few days before the commission of the act of bankruptcy, that he was engaged in extensive operations in this city as a distiller, rectifier and saloon keeper, and was in unquestioned credit with bankers and merchants; that he had a large amount of property in his hands and was apparently in prosperous circumstances. It was also proved that at the time Baierle paid the one thousand dollars and obtained the extension on the five thousand dollar note in November, he explained to respondents that one Golsen had agreed to go into partnership with him and furnish money for the business on which he had depended, but that Golson changed his mind, and at the time of the payment of one thousand dollars in January, Baierle stated that the market for high wines was dull, and he preferred to hold them awhile for better prices, and that he was feeding cattle at his distillery which would be better ready for market and more in demand in sixty days.

In the light of this evidence I do not think respondents chargeable with knowledge of Baierle's insolvency at the time of these extensions, nor with such notice of facts touching his probable insolvency, as should be held sufficient to put a cautious man on inquiry. Baierle's credit was good among those with whom he dealt during all these transactions; that a man engaged in extensive commercial transactions should need extensions or renewals of his commercial paper is no unusual circumstance, and the fact that two responsible citizens were willing to answer as sureties for him, shows the estimate in which he was held by them in regard to solvency. The reasons, too, which he assigned for asking the two last extensions were natural, and there is no dispute as to the existence of those reasons, in fact a failure in an arrangement for partnership in so complicated a business as Baierle was then carrying on might make an extension necessary for the most solvent man, while the condition of the market for the product of his manufacturing business was certainly an adequate reason for continuing his loans in January, rather

than to have sold the high wines and beef at a sacrifice to pay them.

Again, our examination of the proofs of debt against the estate of the bankrupt show that considerable more than half of those debts were contracted between the time these extensions were obtained and the acts of bankruptcy. This fact proves conclusively that Baierle was, at this time, in the full enjoyment of almost unlimited credit in the community with whom he dealt and where he resided. The proof shows that the rate of discount paid was not unusual at the time, but that, on the contrary, the best commercial paper in this city was then in the market at those rates, thus rebutting any presumption or inference of insolvency from the payment of the discount alleged.

I think, therefore, that the petitioners' proof fails in a most essential particular, as to the claim to recover back the two thousand dollars and sums paid by way of discount or interest.

In regard to the preference obtained by the entry and collection of the judgment on the one thousand dollar note, the proof is, that on or about the twelfth day of February, eighteen hundred and seventy, Baierle was missing, and various rumors were afloat in the community in regard to him—by some he was supposed to have been murdered, while others supposed he had absconded with a large sum of money, for the purpose of defrauding his creditors—and these rumors were to some extent the subject of articles and notices in the newspapers published in this city. Niehoff, one of the respondents, testifies that he heard something of these rumors, but did not hear that Baierle was insolvent; that Hoffman, who was surety on one of the notes, talked with him as to what steps he, Neihoff, would take to protect the sureties on the paper he held, and it was finally concluded that judgment could be entered on the one thousand dollar note, which was accordingly done on the morning of the fifteenth of February, about ten o'clock, and the levy made on the execution the same morning, and before the petition in bank-

ruptcy was filed. It is true, Niehoff denies all actual knowledge or information (at the time the judgment was entered) of Baierle's insolvency, but it is clear, from the evidence, that he knew something of the extraordinary rumors afloat in regard to Baierle's being missing, or having absconded; and so much discussion of his affairs seems to have transpired as to lead to the conclusion that the safety of the surety on the note, if not the interest, of Niehoff & Co., required that the power to enter judgment on the warrant of attorney should be called into execution. Niehoff says himself in his evidence, that at the time of the entry of the judgment he "thought something was wrong with Baierle." He evidently did not suppose him dead, as one rumor had it, for he would not have entered judgment against a dead man, and the "something wrong" evidently referred to Baierle's pecuniary affairs, or there would not have been this consultation with sureties, and final conclusion of counsel to enter up a judgment on this note. The proof also shows that Troost, who is a member of the firm of Neihoff & Co., participated in these discussions in regard to Baierle's absence and the course to be pursued in order to secure the debts; the firm held against him, and it would seem from the proof, that this judgment was entered after consultation between Troost and Grater, the surety.

Within a few hours of the entry of this judgment, the records of this court, of which all persons in the district are bound to take notice, contained ample evidence of Baierle's insolvency and acts of bankruptcy, and from the time of the filing of the petition in bankruptcy the respondents are chargeable with full knowledge of Baierle's insolvency. At the time when the satisfaction of this judgment was actually obtained by the sale of the property levied upon, Niehoff & Co. were certainly informed of all the facts necessary to advise them of Baierle's insolvent condition.

The thirty-fifth and thirty-ninth sections of the bankrupt act make void all transactions by which one creditor, with the knowledge of the debtor's insolvency and with the assent of the debtor, obtains a preference as against the other credi-

tors, and the question arises as to whether this is such a preference as is prohibited by these sections.

In considering these questions, the first inquiry is, as to when the preference by means of a judgment note is obtained—is it, when the note with a warrant of attorney to confess judgment is executed and delivered? Clearly not, because the power lies dormant, and in most cases, secret until it is executed by the entry of the judgment. Up to this time the warrant to confess judgment is only an evidence of the debt and gives the creditor no lien and consequently no preference. The warrant of attorney, in fact, is only a means placed in the hands of a creditor by which he may more promptly than other creditors seize the property of the debtor on legal process and only becomes dangerous when used to the detriment of other creditors. It would seem to follow, then, that if a creditor holding a warrant to confess a judgment against a debtor causes the power thus entrusted to him to be exercised after he has notice of the debtor's insolvency, or has notice of such facts as make it reasonable to believe the debtor is insolvent, and takes his judgment and levies upon the property of the debtor with such knowledge or notice, he is guilty of intending a fraud upon the bankrupt act.

The consequences of his acts are to secure a preference over other creditors, and if he obtains such preference with notice of the debtor's insolvency, he is liable to an action by the assignee for the recovery of the property thus obtained or its value. The warrant of attorney is a continuing consent on the part of the debtor to the entry of the judgment by the creditor, and if when the creditor executes the power thus delegated and knows the debtor to be insolvent, the judgment is manifestly an act of bankruptcy participated in by the creditor to such an extent as to make void all advantages obtained thereunder. It will not do to say that because the creditor had no knowledge of the debtor's insolvency at the time he obtained the warrant of attorney, and that the same was given to secure a *bona fide* debt; therefore all he does

under the warrant of attorney, must be sustained—as I said before, the warrant to confess judgment lies dormant until the creditor sees fit to act upon it, and whether his action shall result in such an unlawful preference as will make the creditor liable to the assignee, depends upon the knowledge or information the creditor had in regard to the debtor's insolvency, at the time he made his warrant of attorney operative; applying these principles to the case before me, I think the proof shows that Niehoff & Co., at the time they entered their judgment against Baierle, had knowledge of such facts as gave them reasonable cause to doubt Baierle's insolvency, which is equivalent to having cause to believe him insolvent. They thought "something was wrong with him" and this evidently had reference to his pecuniary affairs, for the action in question was taken to save the surety, Grater, and perhaps partly in his interest. Baierle, it will be remembered, was missing on the twelfth of February, 1870, which was Friday, and it can hardly be possible that, with the large number of creditors and other persons, who were more or less affected by the occurrence, there should not have been a comparison and discussion by those most interested in regard to his financial embarrassment, which must have reached the ears of the respondents and contributed to hasten their action upon this warrant of attorney. I therefore conclude that the judgment entered in this case was entered at a time when the respondents had reasonable cause to believe the bankrupt insolvent, and therefore with intent to evade that provision of the bankrupt act which prohibits and makes void all preferences. Let there be a decree entered for the amount of the execution collected with six per cent. interest.

Motion for new trial by respondent.

ADOLPH MOSES, for petitioners.

HOYNE, HORTON & HOYNE, for respondents.

U. S. DISTRICT COURT—OREGON.

Under the lien act of Oregon, the lien of a mechanic or material man arises from the doing of the work or the furnishing the material and attaches to the building from that time, upon the condition subsequent that the lien creditor file a notice of his intention to hold such lien within three months from the completion of the building.

The notice required to be filed does not *create* the lien, but is necessary to *preserve or continue* it beyond three months after the completion of the building, and, therefore, the commencement of proceedings in bankruptcy between the doing of the work or furnishing of material and the filing of such notice does not impair or affect the lien or the right of the lien creditor to continue it by filing the notice.

The lien given by the local act to mechanics or material men is not opposed to the terms or policy of the bankrupt act, as it in no way prefers one creditor at the expense of another or diminishes the general assets of the debtor otherwise applicable to the payment of his general creditors.

In re J. M. COULTER.

DEADY, J.—On February twenty-third, eighteen hundred and seventy, a petition was filed in bankruptcy against Coulter, and on March third he was adjudged a bankrupt. The usual warrant to take possession of the estate of the bankrupt issued at the same time, and on March fourth the first notice was published by the marshal.

At the date of filing the petition the bankrupt was indebted to Uzafovage & Wright in the sum of one hundred and twenty-nine dollars and seventy-three cents, for material furnished by them to the bankrupt to be used in the construction of a brick building on lot four in block fifty in the town of Salem, Oregon, then, and at the date of the adjudication aforesaid, owned by said bankrupt.

That on March eighth, and within three months from the furnishing of said materials, said creditors filed in the proper office a notice of their intention to hold a lien on said building and lot as a security for said indebtedness.

On March twenty-first, U. & W. made proof of their debt before Willis, commissioner, as one secured by a lien upon the lot and building aforesaid, and stating in such proof the facts aforesaid.

On January thirtieth, eighteen hundred and seventy-one,

the trustee of the estate filed objections to the proof of debt, and moved that the same be expunged. The motion was referred to Mr. Register Hill, who found the facts as above stated and the conclusion of law that U. & W. had no lien.

The question arising upon the objections and argued by counsel, is whether the change of property in the lot and building consequent upon the adjudication in bankruptcy prevented the creditors U. & W. from thereafter filing their notice of lien with effect, although filed within the time allowed by the local lien act. The amount involved in this motion is small, although by stipulation other claims of a like nature are to abide the decision of this one, but the principle involved, is of great practical importance to the community. The decision of the question must turn mainly upon the proper construction to be given to the lien law.

Before passing to that subject, it is well to note and bear in mind that the security given to mechanics and material men is not obnoxious to the letter, spirit or policy of the bankrupt act, because it works no injustice to any creditor. *Foster* v. *Heirs of Stone* (20 Pick. 543), the court in considering a somewhat similar case said: "It may be remarked, however, that in one respect there is an important difference between mechanics' lien for labor and materials and a lien created by attachment. In the latter case, an attaching creditor has no claim for preference over other creditors except by his attachment; whereas when a mechanic obtains a lien under the statute, and *relying thereon*, increases the value of the land by erecting buildings thereon, he has a strong equitable claim for reimbursement to the extent of the value of his labor and materials furnished for building, and in this respect he has a marked preference over the other creditors of the land, *who had trusted to the personal credit of their debtor*."

The lien is given to secure the claims of certain persons for the value of their labor and material bestowed upon the property of the debtor. The operation of the law is a convenient substitute for the giving of a mortgage or other

express security day by day, for the value of such work and material, and is to be considered and enforced as such.

Upon the faith of this security, so given, the one party furnishes labor and material and the other secures the benefit of them. This transaction, as has been said, is not in violation of the terms or policy of the bankrupt act, even although the owner of the property should be insolvent at the time, because such security or lien is only equivalent to the additional value which the creditor has by this means given to the property of debtor, and therefore does not diminish the assets of the latter applicable to the payment of his pre-existing debts.

In *Darby's Trustees* v. *Boatman's Saving Institution*, 4 N. B. R. 197, Mr. JUSTICE DILLON, TREAT and KREKEL concurring, held in the language of the syllabus, that:—"Advances made in good faith to an indebted person, to enable him to carry on his business, *upon security taken at the time*, do not violate either the terms or policy of the bankrupt act, since the debtor gets a present equivalent for the new debt he creates and the security he gives."

Bearing in mind, then, that so far as the bankrupt act is concerned, there is nothing to prevent these creditors from acquiring and enforcing this lien or security for their debt, I proceed to consider the main question:—Have U. and W. acquired a lien upon the property in question by reason of the facts stated?

The lien law of Oregon (Or. Code p. 763) provides:—(Sec. one) that any person, who by virtue of a contract with the owner of a building, shall furnish any material for the construction of such building, "shall, upon filing the notice prescribed in the next section, have a lien upon such building and the lot of ground upon which the same is situated, for such * * * material * * * furnished;" (Sec. two.) If the person furnishing such material desires to avail himself of the provisions of the lien law, he must "at any time within three months from the completion of such building" file in the office of the country clerk a notice of his intention to hold

a lien upon such building for the amount due;" (Sec. three.) "Such lien shall cease to exist at the end of one year after the completion of the building," unless proceedings are commenced to enforce it; (Sec. seven.) "Liens created in pursuance" of this law "shall have precedence over all other liens after the commencement of the building," and if the property is insufficient "to pay all such liens," they are then to be satisfied *pro rata;* (Sec. eight.) The lien against the building to extend to the lot on which it is erected, if "at the time of erecting such building" the same "was the property of the person" who caused it to be erected.

The remaining sections of the statute relate to the enforcement of the lien, and do not bear upon the question under consideration.

From the terms of this statute—indeed from the very fact of its enactment—it is manifest that it was the intention of the Legislature to give mechanics and material men security for the amounts due them without the trouble or inconvenience or even foresight upon their part, of taking any such security by special contract or pledge.

Counsel for the trustee maintains that as U. and W. did not file notice of intention to hold a lien until after the commencement of proceedings in bankruptcy, no lien was created on the property, when under the operation of the bankrupt act, it passed to the trustee; and that no lien upon the property could be created by filing such notice after the building and lot had vested in the trustee for the benefit of the general creditors.

If the premises are admitted the conclusion follows. An adjudication in bankruptcy and the assignment thereunder relate to the filing of the petition and vest the property of the bankrupt, as of the date of such filing, in the assignee or trustee. Bank. Act Sec. fourteen.

This argument for the trustee rest mainly upon the effect claimed for the provision quoted from section one of the act —"shall, upon filing the notice, etc., have a lien upon such building, etc." Upon the *language* of this provision, it is

maintained that the filing of the notice is a condition precedent to acquiring a lien under any circumstances. That the lien is *then* and *thereby* created, and if prior thereto, the interest of the owner or debtor in the property has in any way become vested in another, the right and opportunity to create such lien is lost. No other provision of the law is relied upon as sustaining this position, although it is claimed that none can be found in direct conflict with it.

It seems to me that this construction rests more upon the language of the clause than the reason and purpose of it, considered with reference to the whole act. In the majority of instances, where the owner and debtor is insolvent, it would make the statute of no avail to the creditor, who furnished his labor or materials upon the security of the property.

I think that the statute, taken as a whole and construed with reference to the end to be obtained, and the mischief to be remedied by it, gives a lien in any case from the commencement of the labor or delivery of the material furnished, and that the filing of the notice as prescribed in section two, is only a condition subsequent, which is necessary to be performed *to preserve the lien* for a greater period than three months from the completion of the building.

Section three of the act in providing that in a certain contingency the lien shall cease "to exist at the expiration of one year after the completion of the building," by implication asserts *that it does exist from* the completion of the building. But the notice need not be filed for three months after such completion. True, it may be said, that "the completion of the building" is here referred to merely as an event or point of time in the transaction, from which to date the year given by the section for the enforcement of the lien. But admitting such to be the primary purpose of the reference to this event or point of time, still in asserting or declaring that the lien shall cease to exist in one year from such completion, the legislature have by implication, although not a necessary one, said that such lien does exist during such year.

Section eight, in providing that the lien shall extend to the lot on which the building is erected, if *at the time of such erection* the same was the property of the debtor, by *necessary* implication asserts that the lien exists at such time. Now "the time of the erecting such building" is the time occupied or consumed in its erection from foundation to roof. If the lien exists during all or any portion of this period, it must also exist before the time limited for filing the notice, and cannot therefore be created by it. It may be a question whether this notice can legally be filed before the completion of the building. But it appears probable that such completion is here referred to merely as the event from which to compute and ascertain the point of time in the transaction within which the notice must be filed to preserve the lien; and that such notice may be filed at any time after the performance of the contract for labor or material, and within three months from the completion of the building. Indeed, it may be that the act will permit notice of the lien to be filed day by day as the work or delivery of material progresses, but it does not appear reasonable that the creditor is under any obligation to file notice in any case before the completion of his contract to labor or furnish material. So, if the creditors' lien extends to the lot at any time during the erection of the building as provided by this section, it follows that it may exist before the filing of the notice.

Section seven in providing that the "liens created in pursuance" of this *act*, not the *notice*, "shall have precedence over all other liens after the commencement of the building," declares in effect that for the purpose of preferring this lien to all others, it shall be deemed to exist from the commencement of the building. This indicates very plainly that it was the intention of the legislature to so fasten these liens upon the property as not to permit any other class or description of creditors under any circumstances to subject the value of the labor and material furnished upon the faith of them, to the payment of their debts, unless it be with the express or implied assent of the mechanic or material men.

Taking the whole act together, and considering the manifest purpose of it, as well as the necessary consequence of a different construction, I am satisfied that notwithstanding the letter of the clause in section one referring to the filing of the notice, that a lien is given from the commencement of the work or delivery of material, upon the condition subsequent, that the creditor files the notice prescribed in section two, within the time limited therefor. A failure to perform this condition will doubtless work a loss of the lien. The omission, at least as against third persons, should be construed as an abandonment of the lien. The same effect would follow a failure to enforce the lien within the time prescribed in section three.

Here the trustee succeeded to the rights of the bankrupt in this property at the date of the filing of the petition, and also to such rights, if any, as the general creditors had in it or could assert against it notwithstanding the bankrupt, and nothing more. If he had been a purchaser without notice, for a valuable consideration, under the same circumstances, the property would have passed by the sale, subject to the lien and the right of the lien creditor to do any act which he might have done but for such sale, necessary or required, to perfect, preserve, continue or enforce his lien. *Hotaling et al.* v. *Cronise et al.*, 2 Cal. 64; *Soule et al.* v. *Dawes*, 7 Cal. 576; *Blauvelt* v. *Woodworth*, 31 New York, 287; *Foster* v. *Heirs of Stone*, 20 Pick. 542.

In the course of the argument counsel for trustee cited and relied on the case of *in re* Dey, 3 N. B. R. 81, decided in southern district of New York, in eighteen hundred and sixty-nine. The case arose under the statute of New Jersey, and decides that under that statute the lien did not attach from the time of doing the work or delivering the material, but from the filing of the claim for lien, and that the proceedings in bankruptcy having been commenced before such filing, no lien could be created by a subsequent filing. The statute of this state and that of New Jersey are not alike in some respects, but the difference is more verbal than other-

wise, and the case is one in point. I do not adopt its conclusions because I am not convinced by its reasoning, and do not approve of its policy. To my mind there was no difficulty in holding that under the New Jersey statute the lien attached from the time the work was done and the material furnished. These acts and the indebtedness which arose from them were the meritorious cause of the lien,—the reason for which the statute gave it—and not the mere technical act of filing the claim. The latter is only required as a means of giving notice to the world of what already exists—a lien upon the property—and the intention of the creditor to hold or continue it.

The case cited in the opinion from the New Jersey Rep. (1 C. E. Green, 150-161) does not, so far as I can perceive, necessarily support the conclusion. It may well be that a claim "not filed according to the requirements of the statute" does not constitute an "incumbrance on the premises," and still a lien attach upon the delivery of the material. For although the lien does attach from such delivery, yet if a claim is not filed within the term or to the effect prescribed, it would cease to exist and the filing of such claim would not constitute an "incumbrance on the premises."

It is not, until after long and careful consideration, that I have declined to follow the ruling upon this question of the learned judge who decided *in re* Dey, and who has done so much within a few years to illumine the bankrupt act and establish the practice under it.

My conclusion is, that the lien of U. & W. attached from the delivery of the material, and that the right given by the lien law of the state, to file a notice of intention *to hold*, not *create*, this lien, was not in any way impaired or affected by the subsequent proceedings in bankruptcy. The trustee took the property with the incumbrance. The motion to expunge will be denied with costs, as prescribed in rule fifty-five.

FECHHEIMER for trustee.

BELLINGER & THOMPSON, for U. & W.

U. S. DISTRICT COURT—RHODE ISLAND.

The United States District Court has no jurisdiction over a petition filed by a creditor of the bankrupt, who claims the property by virtue of certain unrecorded mortgages and bills of sale of earlier date than that of a mortgage given to the wife of the bankrupt by a firm of which her husband was a member, to secure the payment of a promissory note given to her by the said firm. The creditor should seek redress and relief by an action at law or suit in equity. A petitioner may have leave of court to convert his petition into a bill in equity, but the answers filed and the testimony taken cannot be used in the prosecution of the suit in its amended form except by consent.

BARSTOW v. *PECKHAM, assignee, et. al.*

KNOWLES, J.—The respondents move for a dismissal of the petition of Barstow, as not within this court's jurisdiction, the movers contending that either by formal suit in equity or regular action at law should the petitioner have proceeded against them, and not, as he has done, by simple petition, invoking summary action on the part of the district judge, subject only to the revisory power of the circuit judge at chambers or in open court; the parties, of course, being thus precluded access to the circuit court as appellants or plaintiffs in error, besides being deprived of all benefit from the rules of evidence and from the established forms and modes of procedure, which parties to suits and actions are accustomed and required to respect and follow.

The question presented arises upon a state of facts somewhat peculiar, thus:

One John Moore upon his petition, filed December second, eighteen hundred and sixty-eight, was on the twenty-ninth of December adjudged a bankrupt. It appearing from his schedules that the bulk of his debts were equally the debts of a copartner (one Joshua S. Browne,) contracted on the firm name of Browne & Moore, such proceedings were had under this court's orders, that the firm of Browne & Moore was declared bankrupts, and on the seventeenth of May, eighteen hundred and sixty-nine, an assignment of their property was made to S. W. Peckham. The property consisted almost exclusively of the tools, machinery, implements and

stock of a silver spoon manufactory, and a jeweler's workshop, which, in January, eighteen hundred and sixty-nine, several creditors of the firm (Barstow among them) had attached on writs from a state court, returnable in March, eighteen hundred and sixty-nine. This property the assignee found in the custody of the attaching officer, and therefore, on the twenty-sixth of May applied to the court for an order dissolving those attachments and also for license to sell the said property free from a mortgage incumbrance conceded by him to exist thereon in favor of Mary S. Browne of Brooklyn, New York, wife of said Joshua, for the sum of five thousand dollars, due by promissory note of the firm, dated July thirteenth, eighteen hundred and sixty-eight, (the date of the mortgage) and recorded in Providence registry, October fifteenth, eighteen hundred and sixty-eight.

Upon the first of these applications the court ordered "That the officer deliver the attached property to S. W. Peckham, assignee, and that said assignee, from the proceeds thereof, when sold, pay said officer his reasonable costs and charges on the attachments and for keeping said property." Upon the second, a notice was ordered to issue to said Mary F. Browne, to appear on the second of June, to show cause against said application, on which day she made appearance filing her "petition in equity" wherein she set forth her claim to the property under her said mortgage, representing that said Peckham had taken possession of the property and refused to surrender the same to her, and prayed that "said assignee be directed to surrender possession thereof to her, to be disposed of under her said mortgage according to law."

After a full hearing upon this petition of Mrs. Browne (as also it is presumable upon the assignee's application for leave to sell,) a decree of the court was entered July fourteenth, eighteen hundred and sixty-nine, as follows:—

"I. That the petitioner has a lien upon the property described in and referred to in the petition, superior to the claims of the respondent subject to any equities the respondent may have for payments made or liabilities incurred in

relation to said property while in his possession or otherwise.

"II. That the respondent may sell the equity of redemption in said property, at such time and in such manner as he may deem best for the interest of the general creditors, and may, at his direction, retain possession thereof until sale be made.

"III. That all questions of costs and of expenses paid or liability incurred in acquiring, holding and delivering over said property be and the same are hereby reserved for further consideration and disposition by the court."

At the hearing upon this petition certain of the attaching creditors (Barstow among them) as well as the assignee were represented by counsel and fully heard.

Under this decree the assignee, within fifteen days, advertised a sale of his equity of redemption in the property by auction, to take place on the fourth of August, eighteen hundred and sixty-nine; whereupon, on the twenty-eighth of July, said Barstow presented to the judge at chambers his petition (the subject of the motion), in which he set forth claims to said property in virtue of certain unrecorded mortgages and bills of sale of earlier date than the said mortgage to Sarah F. Browne, and in virtue of his attachment of January, eighteen hundred and sixty-nine, and prays, among other things, that the court will adjudge his claims upon said property to be paramount in whole or in part to the claim of Mrs. Browne; that a portion of the property be delivered to him; that another portion be restored to the attaching officer; that yet another portion be sold, and that "meanwhile the assignee be enjoined from further complicating the title of said property by any sale of the equity of redemption thereof."

The injunction prayed for was at once granted, the assignee not opposing, and a citation ordered to issue to said Peckham, and Sarah F. Browne and her husband to appear before the court on the fourth of August, to show cause against the petitioner. The injunction to the assignee embodied a

provision that he might move its dissolution at any time on giving one day's notice to Barstow or his solicitor of record.

The several respondents entered appearance on the fourth of August, Peckham filing his answer on the eighteenth of August, the other respondents (by consent) deferring the filing of theirs until September seventh, eighteen hundred and sixty-nine.

It appears from statements of counsel that before the filing of these answers, the propriety or legality of proceeding in a matter of this kind by petition simply was questioned in some quarters, and that the respondents proposed that by consent the aforesaid petition and answers be formally converted into and treated as equity pleadings to all intents and purposes, and that the petitioner declined to accede to this proposal. Also it appears that both parties afterwards manifested a desire to speed the cause as it stood by taking the needed testimony; and more than this, that in January or February, eighteen hundred and seventy, the respondents repeated their offer to the petitioner, expecting a change in the form of the pleadings, coupled, however, with a condition with which unfortunately, in part at least from accident and mischance, the petitioner failed to comply. At last the petitioner declaring or omitting to prepare for a trial of the petition, the respondents, on the twenty-ninth of March, eighteen hundred and seventy, filed the now pending motion to dismiss the petition for want of jurisdiction.

As already stated, the assignee was, on the twenty-eighth of July, eighteen hundred and sixty-nine, forbidden to sell as authorized by the decree of the fourteenth of July. The property meanwhile remained in his custody deteriorating from disuse and subjecting itself or some party, or the assignee himself, to storage expenses of not less than seventy-five cents *per diem*, in view of which facts he early in March, eighteen hundred and seventy, filed his petition to the court praying leave to make sale of the property free from all incumbrances, the proceeds thereof in the registry to be subject to the claims of the antagonizing mortgagees and attaching creditors.

Upon this petition of the assignee Barstow was fully heard, he claiming that the property should be sold in Providence in parcels to suit purchasers; the respondents, Drowne and wife and the majority in interest of ascertained creditors, claiming, firstly, That only the assignee's equity of redemption be sold, and secondly, That if the property itself specifically was to be sold, it should be in bulk as an entirety, and in New York rather than in Providence. Prior to any decision upon this question of sale, the respondents filed this motion to dismiss the petition of Barstow, and thus in the most effectual mode possible, dissolve the injunction of which the assignee complained.

Upon the motion to dismiss, no hearing was asked by either party or ordered by the court until the fifth of October, eighteen hundred and seventy, for the reason that his Honor Justice Clifford, had taken under advisement in June, eighteen hundred and sixty-nine, the case of *Knight* v. *Cheney assignee*, in deciding which it was confidently anticipated that he would give an authoritative exposition of those sections of the bankrupt act upon an assumed construction of which this motion to dismiss is based. The desired opinion of his honor, owing to the pressure of judicial duties of more importance he has not yet committed to paper, but of its tenor and import the parties and counsel in this cause, as well as those in *Knight* v. *Cheney* were fully informed by an oral communication at the September term, eighteen hundred and seventy, of the circuit court when its judgment in that cause was announced.

Any further delay in the disposal of the motion is earnestly deprecated by the respondents, and with reason as it seems to me. I am unable to concur with the learned and astute counsel of the petitioner, that until the opinion in writing of Justice Clifford shall be received, it is advisable to suspend judgment upon this motion. It may happen, as he suggests, that that opinion will contain some qualifying remark excepting the case at bar from the scope of the general principles he orally announced. This is possible,

but is, in my judgment, so improbable that I cannot, in view of it, further delay action upon the question presented.

That question, fully enough stated in my opening paragraph above, is not *now* a novel one. When first passed upon by a justice of the supreme court, (justice Swayne,) his exposition of the law overruling a decision of the judge of the northern district of Ohio, was in harmony with the argument and positions of the learned counsel of the petitioner, *in re* Neal, 2 N. B. R. 82. Subsequently, however, opinions and rulings directly adverse to those of justice Swayne, have been given for the guidance of the profession by two of his associates of the supreme bench, by chief justice Chase, *in re* Alexander, 3 N. B. R. 6, and by justice Nelson, *in re* Kerosene Oil Company, 3 N. B. R. 31, and *in re* Bonesteel, 3 N. B. R. 127, whose rulings in this regard have been followed by judge Blatchford *in re* Ballou, 3 N. B. R. 177. Of the ruling of justice Clifford upon this point in *Knight* v. *Cheney* in this district in September last, it is sufficient to say that I understood them to be in full accord with those of justices Chase and Nelson. Such being the ruling of the judge of this circuit, sustained by two at least of his associates, I can but regard it as authoritative, and accordingly sustain the motion to dismiss.

In the analogous case of *Knight* v. *Cheney*, justice Clifford gave the petitioner leave to convert his petition into a bill in equity if he saw fit, but admonished the parties that the only advantage to be gained by so doing would be a saving of the service of a new subpœna, as the answers filed and the testimony taken (if any) could not be used but by consent in the prosecution of the suit in its amended form. In thus ordering he was understood to exercise a discretionary power, and in that case it doubtless was wisely exercised. In the case at bar, however, I see no occasion for qualifying the order of dismissal. On the contrary, it seems desirable that the assignee and other parties be placed in the same position in which they were under the decree of my predecessor of July fourteenth, eighteen hundred and sixty-nine,

before the filing of the petition of Barstow. That decree, for aught that appears, was satisfactory to all parties interested other than Mr. Barstow. The respective and relative rights of the assignee and of Mrs. Drowne in the property were by that decree defined and settled satisfactorily to them and to the court. Mr. Barstow, so far as is shown, was in no sense a party to those proceedings otherwise than as a creditor of the firm, who had not seen fit to prove his claim, and of course is not bound by the court's adjudication. His rights in the property, however acquired or held, he is of course entitled to protect and enforce as he shall be advised, now being authoritatively informed that by an action at law or *suit* in equity, and not by a simple *petition* to the judge, is he to seek redress and relief.

I will add as not impertinent in this connection, that the thirteenth General Rule, as amended, contains provisions which appear to be designed as well as suited to relieve claim ants and assignees from some of the embarrassments, delays and expenditures to which the parties in this cause have been subjected. Whether in that rule is to be found anything of importance to the parties at this stage of this cause is for them, not the court, to inquire and determine.

The petition is dismissed for want of jurisdiction, and as a consequence, the injunction upon the assignee of July twenty-eighth, eighteen hundred and sixty-nine, ancillary to the petition, is dissolved.

UNITED STATES SUPREME COURT—DECEMBER TERM, 1870.

[In error to the circuit court of the United States for the district of Missouri.]

A joint request made by the individual members of a firm soliciting B. to become a surety of one of them in an administration bond, does not create a liability of the firm. Hence upon the firm being subsequently declared bankrupt, B. has no debt due therefrom, which is recoverable at law.

FORSYTH v. *WOODS, Assignee, &c.*

STRONG, J.—The plea, to which the plaintiff has demurred, avers a joint request made by the individuals who

composed the firm of E. P. Tesson & Co. to the defendant, soliciting him to become a surety of one of those individuals in an administration bond. It also avers a joint representation made to him by them that they intended to make the administration a matter of partnership business, to take into the possession of the partnership all the assets of the intestate, and to share as partners the gains and losses resulting from the administration, so that in signing the bond he would in effect become the surety of the firm and not merely a surety of the partner to whom the grant of letters of administration might be made. The plea further avers that, moved by the joint request, and relying upon the joint representations aforesaid, the defendant did become a surety in the administration bond, and that afterwards (the partnership having taken possession of all the assets of the deceased intestate, and having become bankrupt), he was compelled to pay to the legal representatives and next of kin of such intestate a large sum of money in consequence of the default of the administrator. It is still further averred that under similar circumstances, after like request and representations, the defendant became a surety in an administration bond of the other partner, to whom administration of another estate was committed by the probate court, and that he was compelled to pay money for that administrator's default. Whether these facts show a legal liability of the partnership, as such, to repay what the defendant has been compelled to pay in consequence of his suretyship, is the question presented by the record. If they do, the defendant had a set-off to the plaintiff's demand; if they do not, the demurrer to the plea was rightly sustained.

If it be conceded that such a joint request as is pleaded, followed by an assumption of obligation and a consequent payment of money in pursuance of it, raised an implied promise on the part of those who joined in the request to reimburse the defendant, it is, perhaps, still not clear that it was a partnership promise, creating a debt of the partnership, and therefore entitled to priority in bankruptcy over

private debts of the partners. It is not pleaded that the firm of E. P. Tesson & Co. requested the defendant to assume the obligation he took, though it is averred that the persons who constituted the firm made that request, and it is not certain that a promise by a partnership and a promise by the individual partners collectively have the same effect. If a firm be composed of two persons, associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners, made in their individual names, respecting a matter that has no connection with the firm business, creates a liability of the firm as such. The partnership is a distinct thing from the partners themselves, and it would seem that the debts of the firm are different in character from other joint debts of the partners. If it is not so, the rule that sets apart the property of a partnership exclusively in the first instance for the payment of its debts may be of little value. That rule presumes that a partnership debt was incurred for the benefit of the partnership, and that its property consists in whole or in part of what has been obtained from its creditors. The reason of the rule fails when a debt or liability has not been incurred for the firm as such, even though all the persons who compose the firm may be parties to the contract.

But the substantial fault of the plea in this case is that, at best, it sets up an illegal contract, which the law will not enforce. The promise, if any, of the firm was to indemnify the defendant for doing an act planned and intended to enable his principal in the administration bond to commit a gross breach of trust. The arrangement was entered into in order that the partnership might obtain the possession of all the effects, goods, chattels, rights and credits which had belonged to the intestate decedent and which were assets that the administrator only had the right to hold. It was also a part of it that the administration should be conducted by the firm and not by the person to whom the probate court committed it. To this arrangement the defendant became a party and he signed the bond in view of it and in order that

it might be carried out. This appears from the plea. It needs no argument to show that the transaction was against the policy of the law and plainly illegal.

Letters of administration are a trust. They are granted by the probate court or ordinary because of confidence reposed in the grantee. They require him to take exclusive charge of the personal property of his intestate and to bring to its administration his own personal attention and judgment. He has no right to allow others to control it or to share in its administration. If he does, he exposes it to unnecessary hazards and subjects it to the disposition of persons in whom the officer of the law has reposed no confidence. To permit a mercantile or a banking firm, of which the administrator is a partner, to take the assets of the decedent's estate into his possession and to share in the disposition of them is to invite what the plea shows happened in this case, misappropriation and loss. It is a gross breach of trust, a violation of legal duty. It must be, therefore, that any contract which has for its object such a faithless abandonment of the duties of an administrator cannot be enforced in a court of law.

It is not to be said that the implied promise of the partners or the firm was only collateral to the illegal arrangement. It was a part of it. The signing of the bond and the promise to indemnify were both not only in view of a contemplated transfer of the administrator's duties to the partnership, but they were means avowedly selected for that end.

It follows that the plea set up no debt to the defendant due from the bankrupt firm which is recoverable at law and which can be made available as a set-off. The demurrer was therefore correctly sustained.

Judgment affirmed.

U. S. DISTRICT COURT—S. D. NEW YORK.

[Before JOHN FITCH, Register.]

An involuntary bankrupt who has complied with all the provisions of the bankrupt act can apply for and receive a discharge the same as a voluntary bankrupt. The thirty-third section of the bankrupt act, as amended July twenty-seventh, eighteen hundred and sixty-eight, and July fourteenth, eighteen hundred and seventy, is applicable to proceedings in involuntary bankruptcy. An insolvent, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity, unless the bankrupt, before, on, or at the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims as required by section thirty-three of the bankrupt act as amended. In case an involuntary bankrupt does not tender or file the assent of his creditors or show payment of his debts by the return of the assignee, or that his property and effects equal or will pay fifty per cent. so as to comply with the requirements of section thirty-three of the bankrupt act as amended, the certificate of conformity cannot be granted.

In re H. B. BUNSTER.

This is a proceeding in involuntary bankruptcy. The proceedings in the cause are regular and according to law, up to and including the return of the order to show cause why the above named bankrupt should not be discharged according to law. Several creditors, who have duly proved their respective claims, have filed notice of their appearance by their respective attorneys, and have a right to file specifications of their grounds of opposition to the discharge of said bankrupt within the time prescribed by the act.

By the schedule, it appears that the debts from which the bankrupt seeks to be discharged, were contracted since January first, eighteen hundred and sixty-nine, which brings this case within the provisions of the amendment to section thirty-three of the bankrupt act, approved July twenty-seventh, eighteen hundred and sixty-eight, which reads as follows:

"That the provisions of second clause of the thirty-third section of said act, shall not apply to the cases of proceedings in bankruptcy, commenced prior to the first day of January, eighteen hundred and sixty-nine, and the time during which

the operation of the provisions of said clause is postponed, shall be extended until said first day of January, eighteen hundred and sixty-nine." And said clause as amended July fourteen, eighteen hundred and seventy, reads as follows: "In all proceedings in bankruptcy, commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

Several creditors have duly proved their claims, amounting in the aggregate to the sum of thirty-two thousand and sixty-three dollars and eight cents, and the assets to ten thousand dollars, as appears by the certificate of the assignee. The bankrupt has not shown that his assets equal in value, since the adjudication of bankruptcy, fifty per cent. of the debts proved against his estate as required by law, or that they will do so.

Counsel for the bankrupt, upon all the proceedings in the case, applies for the usual certificate of conformity. He does not offer or tender the assent in writing of a majority of his creditors who have proved their claims, nor any of them, as is required by said section thirty-three, neither does he ask for an adjournment of the order to show cause, but applies for a discharge and the usual certificate of conformity, and claims as a matter of law that said section thirty-three is not applicable to an involuntary case, and only applies to voluntary bankruptcy, and that he is entitled to the certificate of conformity without filing proof that his assets equal fifty per cent. or filing the assent of a majority of his creditors, both in number and value as required by law. That the bankrupt, being an involuntary bankrupt, has the same right to apply, under section thirty-three as amended in eighteen

hundred and sixty-eight, for a discharge as if he was a voluntary bankrupt.

That he having been declared a bankrupt by this court, and having delivered up all his property and effects, both real and personal, to the assignee, he is entitled (the assignee not opposing) to his discharge.

That any other construction of section thirty-three might be the means of transforming the statute from a liberal one to a very harsh one, inasmuch as it might put it into the power of a few of the principal creditors to utterly preclude the bankrupt from obtaining a discharge, although he had in good faith surrendered all his effects to the assignee, and that in this case the bankrupt is entitled to his discharge without the consent of a majority of his creditors, or the payment of fifty per cent. in value as required by section thirty-three. The bankrupt, by his counsel, not only declined to ask for, but positively refused an adjournment of the order to show cause to some future day, which I was willing to grant in order that if the district court decides that said assent was necessary, the same, if possible, might be obtained. The bankrupt claims that he can apply at any future time for permission to file the assent of his creditors to his discharge, and that his failure to do so on the return day of the order to show cause, does not prejudice any of the proceedings already had, and may show assets equal to fifty per cent.

I certify that in the course of the proceedings in this cause now pending before me, the following question arose pertinent to said proceedings, and were stated and agreed to by counsel for the bankrupt, and also by counsel for creditors, and requested the usual certificate to the district court:

I. Can an involuntary bankrupt apply for a discharge under any of the provisions of the bankrupt law?

II. Is the thirty-third section of the bankrupt act as amended July twenty-seventh, eighteen hundred and sixty-eight, and July fourteenth, eighteen hundred and seventy, applicable to proceedings in involuntary bankruptcy?

III. Can an involuntary bankrupt whose assets have been

surrendered to the assignee, but without proof that the assets equal or amount to fifty per cent. of the amount proved against his estate, be discharged without the assent of a majority in number and value of his creditors who have proved their debts, &c., as required by said section thirty-three of the bankrupt act as amended, having been filed in the case at or before the time of the hearing of the application for discharge?

IV. Can the certificate of conformity be granted in an involuntary case, when the assets do not equal fifty per cent. of the claims proved, which accrued subsequent to January first, eighteen hundred and sixty-nine, and the bankrupt does not file an assent of the majority of his creditors who have proved their claims, &c., as required by the aforesaid section of the bankrupt act as amended?

V. Can a bankrupt who neither pays the fifty per cent., and who does not prove that his assets equal or amount to that sum, and who does not tender or file the required assent, apply again for a discharge under and by virtue of the order to show cause, unless the return day of the order to show cause has been adjourned?

The bankrupt act prescribes a particular and specific code of procedure or practice which the bankrupt must comply with before the question as to whether he is entitled to a discharge can be entertained by the court.

In this case the bankrupt has complied with all the requirements of the bankrupt act, with the exception of paying fifty per cent. of the amount of debts proved against his estate, or showing that they equal or amount to fifty per cent., or filing an assent in writing of a majority in number and value of his creditors who have proved their debts to his discharge, without regard to the percentage which may be realized from his estate.

That section thirty-three of the bankrupt act expressly provides that a bankrupt may be discharged if he files such an assent on or before the return day of the order to show cause why he should not be discharged; consequently, if he

fails so to do, and his estate does not equal or amount to fifty per cent. of the debts proved, the court cannot entertain his motion or application for a discharge.

From the scope and tenor of the bankrupt act, it appears to have been founded upon the idea and principle, that unfortunate debtors should be released from their pecuniary contracts (except those fraudulently contracted) by a general law, in conformity to article one, section eight, of the constitution of the United States. Such a general law is the bankrupt act of Congress, approved March second, eighteen hundred and sixty-seven. Involuntary bankruptcy did not originate with the act of Congress, approved March second, eighteen hundred and sixty-seven, as the State of New York has for years her statute enactments, whereby imprisoned and insolvent debtors were discharged both from imprisonment and from their debts; the act entitled "an act to abolish imprisonment for debt, and to punish fraudulent debtors," passed April twenty-sixth, eighteen hundred and thirty-one, and the several acts amending the same; the Massachusetts insolvent laws, the English bankrupt act, together with section one of the bankrupt law of eighteen hundred and forty-one, which act of eighteen hundred and forty-one took effect February first, eighteen hundred and forty-two, resembled, in this particular, the English bankrupt act. 6 Geo. IV., 16.

By the act of eighteen hundred and forty-one, it was provided that any person so declared a bankrupt at the instance of any creditor, may petition the court, &c., and upon complying with the provisions of the act of eighteen hundred and forty-one, was discharged in the same manner as the insolvent who applied by petition, from all debts which "shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any fiduciary capacity."

The practice as to the commencement of proceedings under the act of eighteen hundred and forty-one, and also under the act of eighteen hundred and sixty-seven were

different, in voluntary and involuntary cases up to the adjudication; then they were united in both manner and form of procedure, and to the manner of application for discharge. In this district, under the act of eighteen hundred and sixty-seven, both class of cases have uniformly been granted the same relief, no distinction having been made. The inference is fair, that had congress intended to take, by virtue of section thirty-nine of the bankrupt act, the property of an insolvent, dividing it among his creditors and not have afforded him any relief and denying him a discharge, similar to the one given to a voluntary bankrupt from his debts, that an express provision refusing such a discharge would have been contained in the act. But we are not left to doubt or conjecture on that point, neither must we decide the question by implication, as section thirty-two of the act of eighteen hundred and sixty-seven, in providing for a discharge under and by virtue of the act, uses the words, "the bankrupt," thus, by the ordinary acceptation of the words, includes both a voluntary and involuntary bankrupt. The discharge in form, as set forth in section thirty-two of the act of eighteen hundred and sixty-seven, in describing the bankrupt, also in reciting the proceedings had, uses the words, "on which day the petition for adjudication was filed by or against him," the words "or against" are in parenthesis, thereby clearly indicating that the words "or against" were put in the act for the express purpose of showing that a person against whom a petition in bankruptcy had been filed was entitled to a discharge, the same as one by whom a petition had been filed by himself. The words "on his own application," when taken in connection with sections thirty-six and thirty-seven, all seem to tend to the conclusion, that after the adjudication, the practice and relief, as to both voluntary and involuntary proceedings, should be the same, subject, however, to the provisions of section thirty-nine of the act. *In re* Clark, 3 N. B. R. 3, and *in re* Dibblee, 2 N. B. R. 185, seems to be decisive on this point, and is in accordance with the uniform practice of the United States district courts

throughout the United States, an involuntary as well as a voluntary bankrupt may apply for a discharge. Gazzam on Bankruptcy, 2d edition, 134.

It was the avowed determination of Congress, in passing the bankrupt act, to destroy and eradicate the unjust, oppressive and improper system which had become so prevalent, and an evil too grevious for honest men to bear, by which insolvent debtors could, under State laws, pay whom they choose, and cheat and defraud all others. By means of confessions of judgment, conveying, transferring real estate or assignments, mortgages on real and personal property, and other means, prefer their friends, and render the administration of the laws for the collection of debts, a mere farce. But now all is changed since the passage of the bankrupt act, which has suspended the State insolvent laws, *ipso facto*, as soon as it took effect. *Commonwealth* v. *O'Hara*, B. R. Sup. xix; *Van Nostrand* v. *Barr*, 2 N. B. R. 154; *Perry* v. *Langley*, 1 N. B. R. 155; *Martin* v. *Berry*, 2 N. B. R. 188; *Conner* v. *Miller*, *et al.*, 1 N. B. R. 98. No preference can be given to relatives or friends; each creditor who proves a claim shares with the other creditors, all receiving their *pro rata* share alike.

This is just and equitable, and in accordance with the true principles of justice and equity, of which all honest men approve.

The views of the bankrupt's counsel in this case are not sound. Bankrupts are no worse off if their property is equally divided, than they would be if (as in this case) it had been taken on execution by a creditor, upon a judgment in a State court. It is better for the bankrupt that his property be equally distributed, and he be discharged by assent of his creditors, (as he probably would be) for creditors are usually lenient when an insolvent is honest, (and usually sign the assent to his discharge when requested to do so), than to be left hopelessly insolvent, and not relieved by the decree of this court.

I fail to see any just or valid ground upon which a bankrupt can be discharged without complying with the require-

ments of section thirty-three as amended; and I also fail to see any legal grounds upon which the case, *Repplies* v. *Bloodgood*, 1 Sweeny, Superior Court Rep., N. Y., 34, was decided. The court in that case held, that an involuntary bankrupt could not apply for a discharge, and says "section thirty-five of the act declares void all securities or contracts made or given in order to induce any creditor to forbear opposing the application for discharge of the bankrupt. But in this involuntary proceeding, taken by a creditor against the bankrupt, there is not, nor can there be any application for discharge of the bankrupt. The statute provides no method or means whereby a bankrupt can apply for a discharge in a proceeding hostile to him, instituted by a creditor. In this respect, as well as others, the United States law differs from the English bankrupt statutes." In this respect Judge Fithian, who delivered the opinion of the court, mistook the tenor and effect of the English bankrupt law in proceedings to be taken for the discharge of the bankrupt, and in any proceedings which may be instituted against a bankrupt under the English bankruptcy act of eighteen hundred and sixty-nine, must be had under section forty-eight and forty-nine of the act, whether the proceedings have been instituted by or against a bankrupt, and are similar to the proceeding under section thirty-three of the bankrupt act, part one, adjudication in bankruptcy, of the English bankrupt act of eighteen hundred and sixty-nine. 32 and 33 Vict. c. 71.

"An act to consolidate and amend the law of bankruptcy" contains similar provisions in regard to proceedings in cases of involuntary bankruptcy, &c., to section thirty-nine and forty of our bankrupt act. The English bankrupt act applies for the most part to cases of involuntary bankruptcy.

In section thirty-three of the bankrupt act as amended; the following words occur, to wit: "In all proceedings in bankruptcy." It is difficult to perceive how a court can construe that sentence so as to annul and ignore the word "all," and confine the privilege of a discharge to voluntary bankrupts alone. The section, as a whole, and the sentence

aforesaid, is unmistakable and precludes the idea of any distinction between voluntary and involuntary proceedings, or that it denies to the involuntary bankrupt the relief afforded to the voluntary bankrupt. That would be a hardship, and leave the bankrupt, where the State laws do, an insolvent, after the taking of his property by execution, and deny him the relief afforded by the bankrupt act, which was intended as a palliation for the harsh remedy of involuntary bankruptcy.

The bankrupt act is two fold in its operations, it being an insolvent as well as a bankrupt act. It has the same scope and effect as an insolvent law as the State acts had, and acts upon the same cases and persons, suspending the State insolvent laws as per article six, section two of the constitution of the United States.

An involuntary bankrupt has few, if any, of the equities in his favor which can be claimed by a voluntary bankrupt. One of the elements of fraud in bankrupt proceedings, as set forth by judge Blatchford, *in re* Lowenstein, 2 N. B. R. 99, is, that the involuntary bankrupt has not done what he should have done, *i. e.*, filed his petition in bankruptcy. The law, by adjudicating him bankrupt, has determined his status, and by virtue of such adjudication he has been forced to do what he should have done of his own free will. That his property has been taken forcibly only shows that the law has been compelled to use force to compel him to do his duty. The bankrupt cannot question the propriety or justice of the law in having compelled him to do his duty. Instead of its being a reason in favor of, it is rather a reason against his discharge. As the law magnanimously overlooks his delinquency in not filing his petition—as the law requires—and provides that he may nevertheless receive a discharge, if he will only comply with the same terms that are required of a voluntary bankrupt, he should gladly comply with and accept the same, not as a right, but as a favor granted him, thus giving him a legal, but not a moral release from his pecuniary obligations. It has ever been a cardinal rule of moral honesty, that a debtor cannot be released from a moral

obligation to pay a debt, except upon the payment of the same, or in some way or manner satisfying the creditor; nothing else can exonerate the conscience of the debtor, or discharge the moral obligation created by contracts between man and his fellow-man.

I am clearly of the opinion that if an adjournment is not had upon the return day of the order to show cause, &c., no further proceedings can be had under or by virtue of that order; and if, upon that day, the bankrupt fails to show the payment of the fifty per cent., or that his property and effects were equal to fifty per cent. of the claims proved against his estate, upon which he shall have become liable as principal debtor upon the debts created since January first, eighteen hundred and sixty-nine, or unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge.

In construing and administering the act, courts should be guided by the judicial decisions and precedents founded upon the enactments of a simular nature, by the courts of England and of the various states of the United States; also follow the rules as laid down in the elementary works upon the construction of statutes. In doing so they give form, force and solidity to judicial proceedings, as well as carry out the evident intention of the law makers. Any other rule would create the most interminable confusion, conflict of authority and of decisions,—the same as have arisen under the ill-digested and unintelligible code of procedure of this state—and entail upon the whole country the curses inflicted by the code of procedure, and the conflicting decisions thereon by the courts of this state, a calamity which all who are required to construe and administer the bankrupt act should endeavor to avoid.

I. I decide that an involuntary bankrupt who has complied with all the provisions of the bankrupt act, can apply for and receive a discharge the same as a voluntary bankrupt.

II. That section thirty-three of the bankrupt act, as amended July twenty-seventh, eighteen hundred and sixty-eight, and July fourteenth, eighteen hundred and seventy, is applicable to proceedings in involuntary bankruptcy.

III. That an involuntary bankrupt, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to or being equal to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity, unless the bankrupt before, on, or at the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, as required by section thirty-three of the bankrupt act, as amended.

IV. That a certificate of conformity cannot be granted in an involuntary case where the debts accrued subsequent to January first, eighteen hundred and sixty-nine, and when the assets do not amount to fifty per cent. of the claims proved, and also the bankrupt does not, upon the hearing of the application for discharge, tender or file an assent in writing of the majority of his creditors, in numbers and value, to whom he shall have become liable as principal debtor, and who have proved their claims in accordance with section thirty-three, as amended.

V. That in case an involuntary bankrupt does not tender or file the assent, or show by the return of the assignee, the payment of, or that his property and effects amount to, equal, or will pay fifty per cent. so as to comply with section thirty-three of the act as amended, the certificate of conformity cannot be granted, and that unless an adjournment is had, all the proceedings under the order to show cause falls, and the bankrupt is virtually out of court, and can only be reinstated or relieved by the court in its exercise of its general common law and equity jurisdiction conferred upon it by article three, section two, of the constitution of the United States.

This case brings up the question as to the discharge of

an involuntary bankrupt under the provisions of the bankrupt act. As yet there has not been any express adjudication by any of the United States courts as to the true meaning and intent of section thirty-three of the act, as amended; and as the superior court of this city, at general term, has decided that an involuntary bankrupt cannot be discharged at all, and that inasmuch as the counsel for the bankrupt is so decidedly of the opinion that an involuntary bankrupt is entitled to a certificate of conformity and a discharge, upon the production of the certificate of the assignee that the bankrupt has surrendered to the assignee all his property as required by the bankrupt act, and without the payment of fifty per cent. or assets equaling fifty per cent., &c., and although his assets do not amount to or equal fifty per cent., &c., &c., the counsel for the bankrupt makes this application in good faith, firmly believing that his views are correct.

The several counsel for the opposing creditors also claim that they are correct in entertaining the opposite view of the act. All desire that the district court should pass upon the questions.

BLATCHFORD, J.—I concur fully in the five conclusions of the register, except that I do not decide that the bankrupt, when out of court, the case put in the fifth conclusion can be reinstated or relieved by the court.

UNITED STATES DISTRICT COURT—NEW JERSEY.

Bankrupt filed a petition for his discharge more than one year after adjudication, setting forth in said petition that no debts had been proved, and no estate had come into the hands of the assignee for distribution. No debts in the case had been proved, and assets to the amount of ten dollars and eighty cents had come into the hands of the assignee.

Held, That bankrupt should have filed his petition for discharge within one year after adjudication, and failing to do so, discharge must be refused.

In re P. C. SCHENCK.

NIXON, J.—The application of the bankrupt for his final discharge bears date on the first day of March, eighteen hundred and seventy-one. It represents that no debts have been proved against him, and that no assets have come to the hands of the assignee for distribution.

Upon this application a rule to show cause was granted, returnable on the twenty-first day of March last before the court, requiring all persons in interest to show cause on that day why the prayer of the petitioner should not be granted.

The report of the register, Mr. Elmendorf, with the papers in the case, was filed with the clerk on the twenty-seventh day of March. The register's report shows that assets to the amount of ten dollars and eighty cents, had come to the hands of the assignee, that no creditors have proved their debts against the said estate, and that the applicant was duly adjudged a bankrupt on the fifteenth day of June, eighteen hundred and sixty-eight.

This case involves the proper construction of the twenty-ninth section of the bankrupt act, and the power of the court to grant a discharge when no debts have been proved against the bankrupt or no assets have come to the hands of the assignee.

The applicant has allowed more than one year to elapse after the order of adjudication, before he made his application for his discharge. Has this court the power under such circumstances to grant a discharge? I think not. The words of the section are: "If no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee," the bankrupt may, "at any time after sixty days, and *within one year from the adjudication of bankruptcy*, apply to the court for a discharge from his debts." This is a privilege that the section gives to the bankrupt, and which he must exercise within the time designated or not at all.

I am aware that there has been some conflict of opinion amongst the judges in this matter, but I think that all doubt has been quieted by the congressional construction of the act, given by the committee on the revision of the law, in their report to congress on the twenty-ninth day of February, eighteen hundred and sixty-nine, and I feel constrained to follow their interpretation of the section, until advised by proper authority that a different one is admissible.

The application for a discharge is denied.

UNITED STATES DISTRICT COURT.—S. D. NEW YORK.

A discharge will be refused for want of jurisdiction where the testimony shows that the bankrupt did not reside, or carry on business within the meaning of the act, in the district where the petition was filed for the six months next immediately preceding the time of filing, or for the longest period during such six months, although he removed to that district more than a month before the commencement of proceedings.

In re J. LEIGHTON.

BLATCHFORD, J.—In this case a discharge is refused because the court has no jurisdiction over the case. The case is one of involuntary bankruptcy. The creditor's petition alleged that the debtor, for a period of six months next preceding the date of the filing of the petition, had resided at the city of New York, in this district. The petition was filed January twenty-first, eighteen hundred and sixty-eight. The adjudication was made February first, eighteen hundred and sixty-eight, on default of the debtor to appear after personal service. The testimony shows that from May first, eighteen hundred and sixty-seven to December seventh, eighteen hundred and sixty-seven, the bankrupt resided at Boston, Massachusetts, and that from the latter date till January twenty-first, eighteen hundred and sixty-eight, he resided at New York. Therefore he did not reside in this district for the six months next immediately preceding the time of filing the petition, or for the longest period during such six months. Nor did he carry on business in this district for such six months, or for the longest period during such six months. He did not carry on business any where within the meaning of the act during any part of such six months. Certainly he did not carry on business in this district for such six months, and if he carried on business anywhere during any part of such six months, the place where he carried it on for the longest period during such six months was Boston.

It is urged that under section thirty-nine of the act, it is only necessary that a person should reside within the juris-

diction of the United States, and owe debts provable under the Act, exceeding the amount of three hundred dollars, to enable any creditor of his to the amount of at least two hundred and fifty dollars, to put him into bankruptcy for a cause specified in that section by proceedings instituted in any district, without regard to the restrictions as to residence and carrying on of business imposed by section eleven, provided the order to show cause be served as provided in section forty. This is an erroneous view of the law. The restrictions in section eleven, as to the judge to whom the petition is to be addressed, apply to proceedings under section thirty-nine. If not, there is no authority given to any court to hear involuntary proceedings.

The thirty-ninth section does not say to whom the petition is to be addressed or where it is to be filed; and the first section only gives to the district courts as courts of bankruptcy authority to hear and adjudicate upon matters and proceedings in bankruptcy according to the provisions of the act. Such is the view of the justice of the supreme court. In Form No. fifty-four, in the schedules to the General Orders in bankruptcy, which is the form for a creditor's petition under section thirty-nine, the creditor is required to state the jurisdictional facts as to the residence of the debtor in the district where the petition is brought for the period specified in section eleven.

A discharge is refused for want of jurisdiction.

HAWKINS & COTHREN, for the bankrupt.

GEORGE BLISS, JR., for the creditor.

UNITED STATES CIRCUIT COURT—ALABAMA.

A railroad company created by the laws of Alabama, called "The Alabama & Chattanooga Rail Road Company," and a corporation of the same name and with the same board of directors and the same officers, chartered by each of the states of Georgia, Tennessee and Mississippi, which four states the railroad traverses, was on the eighth day of June, eighteen hundred and seventy-one, adjudged bankrupt by the United States district court of Alabama. Notwithstanding the fact that the company had no principal office in the state of Alabama, neither do its president, directors or superintendent keep an office within that state, nor have either of them been "*found*" within the middle district of Alabama, where the proceedings were commenced. The order to show cause directed to be served on said corporation, in the proceedings upon which the adjudication of bankruptcy was made, was served upon an officer of the company at its principal office in Chattanooga, Tenn. The order of adjudication was granted, because of the default made by the company on the return day of the order to show cause. Temporary custodians were thereupon appointed, authorized and directed to take possession of the company's property, and acted upon this authority.

Upon the hearing of the petition for review on behalf of the corporation, the authority of its counsel was denied. The professional statement of counsel as to their authority must be taken as conclusive evidence of the fact asserted unless proof to the contrary is made. No such proof being offered, their appearance is allowed. Objection was also raised to the service of the petition of review upon the attorneys for the petitioner in the preceding proceedings, for the reason that upon the adjudication of the corporation their relation of attorney ceased as to petitioning creditors.

The service on the attorneys being sufficient, because reasonable notice to counsel is sufficient, and they are still the counsel for petitioning creditor, as bankruptcy proceedings are a single statutory case from the filing of the petition to the discharge of the bankrupt. And appearance cures defective service. The power of review is conferred by the bankrupt act on the circuit court in term time, or a circuit judge in vacation.

As the bankrupt law must be uniform to comply with the requirements of the constitution, therefore, where two constitutions are possible, the one which avoids constitutional objections must be preferred. As the state of Alabama is included within the fifth judicial district, the objection to the jurisdiction of this court is overruled.

A corporation carrying on and pursuing any lawful business defined and clothed by its charter with power to do so, is clearly a business corporation, and amenable to the provisions of the bankrupt act, therefore the objection to the adjudication of a rail road company, because it is not a monied business, a commercial corporation, or a joint stock company is not well taken. For it seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, literary, educational, municipal or political purposes.

Where the bankruptcy proceedings are based on the ninth clause of the thirty-ninth section of the bankrupt act of eighteen hundred and sixty-seven, as amended, it is necessary to aver and prove that the debtor was either a banker, broker, merchant, manufacturer, miner or trader, and as the charter of the Alabama & Chattanooga Rail Road Company does not authorize it to carry on either of these pursuits, it does not come within the provisions of the ninth clause of section thirty-nine, as amended. As the petition upon which the adjudication of this rail road company was made, did not allege that it was either a banker, broker, merchant, manufacturer, miner

or trader, and as no proof thereof was offered to this effect, the irresistable conclusion is, that upon that petition and the proofs presented to the court, this railroad company should not have been adjudicated a bankrupt. The fortieth section of the bankrupt act does not intend that if the debtor "cannot be found" within the district where the proceedings are pending, or have been commenced, that the marshal as messenger, even if cognizant of the whereabouts of the debtor without the district, shall then prove absence to effect service. Such service is invalid, and if adjudication of bankruptcy is taken by default on a defective petition and the proof does not show any act of bankruptcy, and the same is defective, the adjudication will be reversed, and the property of the bankrupt, if in the hands of officers, applied by the court to have custody of the same, will be relinquished, and the petitioning creditor adjudged to pay the costs of the entire proceedings.

ALABAMA & CHATTANOOGA R. R. CO. v. *JONES.*

WOODS, J.—On the eighth day of June, eighteen hundred and seventy-one, the Alabama and Chattanooga railroad company was, on the petition of William A. C. Jones, adjudged a bankrupt by the district court for the middle district of Alabama, sitting in bankruptcy.

This petition is filed to review and reverse that adjudication.

The facts, as developed by the pleadings and testimony, are these: the Alabama and Chattanooga railroad company is a railroad corporation created by the laws of Alabama. A corporation of the same name, and with the same board of directors and the same officers, is also chartered by each of the states of Georgia, Tennessee and Mississippi. The termini of the road are Chattanooga, Tennessee, and Meridian, Mississippi, and the road traverses the four states above named. The road passes through the counties of DeKalb, Etowah, St. Clair and Jefferson, in the northern district of Alabama, and through the counties of Shelby and Tuscaloosa in the middle district, and Hale, Greene and Sumter in the southern district. The principal office of the company is at Chattanooga, Tennessee, and it has no principal office in the state of Alabama, nor does the president, or any of the directors, or the superintendent, reside in or keep any office of the corporation within the state of Alabama, nor have they or either of them been "found" within the middle district of the state of Alabama.

The order to show cause directed to be served upon the corporation in the original proceedings was served, as shown by the affidavit of A. J. Walker, on June third, eighteen hundred and seventy-one, by L. B. Jones, deputy United States marshal for the eastern district of Tennessee, upon J. C. Stanton, in the office of the Alabama and Chattanooga railroad company, in Chattanooga, Tennessee, in which said office said Stanton was acting as the general superintendent of said railroad company, and he was at the time of such service the superintendent of said company, managing its affairs through its entire length, including the state of Alabama.

The petition of William A. C. Jones, upon which the adjudication of bankruptcy was made, avers, among other things, that he is a creditor of the Alabama and Chattanooga railroad company, a corporation under the laws of the state of Alabama, which, for a period of six months next preceding the date of the filing of the petition, had carried on business in the state of Alabama and the middle district thereof in its said corporate name; that the petitioner's demand against the company was a promissory note, dated Boston, December nineteen, eighteen hundred and sixty-eight, made by the Alabama and Chattanooga railroad company, for the payment of four thousand and ninety-seven dollars and seventeen cents, to the order of W. A. C. Jones, at the National Security bank, Boston, two years after date; and that within six calendar months next preceding the date of the petition, the said company had committed an act of bankruptcy within the meaning of the bankrupt act, to wit: That said company, within the period aforesaid, and within said district, to wit: on the third day of January, eighteen hundred and seventy-one, being a corporation under the laws of the state of Alabama, and organized as a joint stock company and carrying on a moneyed business within the limits of said district, had fraudulently stopped or suspended, and had not resumed payment of its commercial paper within a period of fourteen days.

Like averments are made as to two other notes of the company held by the petitioner, one for five thousand and sixty-six dollars, and the other for five thousand dollars.

On the day upon which the order to show cause was returnable, the company made default, and was, upon proof of the service of the order to show cause made as before stated, adjudged a bankrupt, and Egbert H. Grandin and John F. Bailey, citizens of Alabama, were appointed temporary custodians of the property of the company, and were authorized and directed to take possession thereof.

The petition of review states many grounds upon which a reversal of the decree of the bankrupt court is asked. In the view we take of the case it will be unnecessary to notice them all.

Some preliminary questions were raised on the hearing of the petition of review, which the court is required to pass upon.

1. The authority of counsel to file this petition and appear for the railroad company was denied. The counsel for the railroad company thereupon stated professionally that they were duly authorized by the company to institute and prosecute this proceeding. In our opinion this statement must be taken as conclusive evidence of the fact asserted, unless some proof to the contrary is shown. No such proof is offered, and this objection may be well considered as out of the way.

2. The service of the petition of review was made upon Walker and Murphy, who were of counsel for Jones in the original proceeding. It is objected that this is not sufficient; that as soon as the decree of bankruptcy was rendered the case was at an end, and their relation of attorneys ceased. It appears from the proof that an attempt to serve Jones with notice of the petition of review was made, but it is alleged the service was defective. We think the service upon the attorneys of Jones was sufficient. The proceeding in review is a part of the original case, and for the purposes of the review the parties are still in court. "The proceeding in bankruptcy from the filing of the petition to the discharge

of the bankrupt and the final dividend is a single statutory case or proceeding." York's case, 4 N. B. R. 156. The proceeding in review is intended to be speedy and summary. Reasonable notice to counsel accomplishes the ends of justice. If it were necessary to serve the party himself, he might defeat the reversal of the decree by avoiding service of notice, which it is alleged Jones in this case has attempted to do.

The practice of serving the notice upon counsel is now well established in this circuit, and as no injustice can result from the practice, we are not disposed to change it. We consider the service upon counsel sufficient, and this objection is overruled. Even if the service were bad, it has been cured by the appearance of the defendant, Jones, and the filing of his answer to the petition of review.

3. It is suggested that in the middle district of Alabama, neither the circuit court nor a judge thereof has jurisdiction to review the proceeding of the district court for that district sitting in bankruptcy. This view is based upon the act of Congress, 5 Statutes at Large, 315, section 8, which provides that the district court for the middle district of Alabama, in addition to the ordinary jurisdiction and powers of a district court of the United States, shall, within the limits of said district, have jurisdiction of all causes except appeals and writs of error which now are, or hereafter may be, by law, made cognizable in a circuit court of the United States, and shall proceed therein in the same manner as a circuit court.

The fair construction of this act does not make the said district court a circuit court. It remains a district court, but with enlarged jurisdiction. It is not clothed with all the powers of a circuit court, for it is denied jurisdiction in cases of appeal and writs of error. This jurisdiction is necessary to make it a circuit court, as that term is used in the statutes of the United States. It can scarcely be claimed that the judge of the middle district sitting in the district court would have jurisdiction to review and reverse his own decree made as a bankrupt judge. The reasons are obvious. The power of review is conferred by the bankrupt act on the circuit

court in term time, or a circuit judge in vacation. The district court of the middle district of Alabama is not a circuit court, nor is the judge thereof a circuit judge. He may sit as a judge in a circuit court, but that does not make him, especially in vacation, a circuit judge, as that term is used in the bankrupt act.

Under the bankrupt act of eighteen hundred and forty-one it was held by the United States supreme court, 1 Howard, 265, that upon questions adjourned from the district to the circuit court, the district judge could not sit as a member of the circuit court, and consequently the points adjourned could not be brought before the supreme court by a certificate of division.

If we are correct in these views, it follows that unless the circuit judge has jurisdiction in this case, the right of review is denied in cases of bankruptcy in the middle district of Alabama, and others where the district court has circuit court powers. The constitution of the United States authorizes Congress to establish *uniform* laws on the subject of bankruptcies, and the bankrupt act of eighteen hundred and sixty-seven is entitled an act to establish a *uniform* system of bankruptcy throughout the United States. If we yield to the view that the revising jurisdiction conferred by the second section of the bankrupt act upon the circuit court and its judges does not apply to the middle district of Alabama, the law is not uniform, nor is the system uniform. Important remedies are denied to parties in the bankrupt court of this district which are conferred upon parties in other districts, and the bankrupt law is open to the constitutional objection that it is not uniform. We are constrained so to construe the law, if possible, as to make it conform to the constitution, and where two constructions are fairly open for adoption, the one which avoids constitutional objections must be preferred.

There is another view of this question which we think is conclusive. The second section of the bankrupt act provides that the several circuit courts of the United States within

and for the district where the proceeding in bankruptcy shall be pending, shall have a general superintendence and jurisdiction, &c., and the powers and jurisdiction hereby granted may be exercised either by said court or by a justice thereof in term time or vacation.

By the act of Congress passed July third, eighteen hundred and sixty-six, 14 Statutes at Large, 209, section two, it is provided among other things that the districts of Georgia, Florida, Alabama, &c., shall constitute the fifth circuit. The district court which rendered the decree now under consideration is in the state of Alabama, and consequently within one of the districts comprising the fifth circuit, and therefore the circuit court and the judges thereof for the district of Alabama have by the terms of the bankrupt act jurisdiction of all cases and questions arising under the act, and may hear and determine them upon bill, petition, or other proper process.

The objection to our jurisdiction in this case must be overruled.

This brings us to consider the grounds upon which a reversal of the decree adjudging the petitioner a bankrupt is sought.

It is objected to the decree that a railroad company is not of such character as to be included within the provisions of the bankrupt act. The act, section thirty-seven, provides that its provisions shall apply to all moneyed, business or commercial corporations and joint stock companies; and that, upon petition of any officer of such corporation or company duly authorized thereto, or upon petition of any creditor of such corporation or company, made and presented in the manner provided in respect to debtors, the like proceedings shall be had and taken as are provided in the case of debtors.

It is said on behalf of the petitioner that a railroad company is not a moneyed, business or commercial corporation. We cannot concur in this view. A corporation carrying on and pursuing any lawful business defined by its charter, and

clothed with power to do so, for the sake of gain, is clearly a business corporation and amenable to the provisions of the bnnkrupt act. *Rankin & Pullan* v. *Florida, Atlantic & G. C. R. R. Co.*, 1 N. B. R. 196.

The petitioner is authorized by its charter to construct a railroad and to convey thereon, for gain, passengers and freight. Its main and primary object is to do these things for gain. It is, therefore, a business corporation, as the term business is popularly understood.

It seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, social, literary, educational, municipal or political purposes. These may all be in one sense, moneyed or business corporations, for they must all have and use money and transact business, to some extent, in order to carry out their objects. But we do not call them moneyed corporations as we would a bank, nor do we call them business corporations, as we would a manufacturing or mining company or express company, because their chief and primary object is not to transact business or make gain. They necessarily transact business in order to accomplish other ends than the mere doing of business and making profit.

The building of a railroad is certainly carrying on a business. The transporting of passengers, mails and freight for hire is certainly a business, and a company organized to make gain from these pursuits as its chief and ultimate purpose is clearly a business corporation. The voluntary application of a railroad company to be adjudged a bankrupt would hardly be dismissed on the ground that it was not a business corporation. *Adams* v. *Boston, Hartford & Erie Railroad Company*, 4 N. B. R. 99.

But the petitioner says that admitting it to be a business corporation, it cannot be forced into involuntary bankruptcy on the ground that it has fraudulently stopped payment of its commercial paper, unless it is also averred and shown to be a banker, broker, merchant, trader, manufacturer or miner.

In order to compel a corporation into involuntary bankruptcy under the clause of the thirty-ninth section, which this proceeding in bankruptcy is based upon, three things are necessary to be averred and proven. 1. That the corporation is a moneyed, business or commercial corporation. 2. That it is a banker, broker, merchant, trader, manufacturer or miner. 3. That it has fraudulently stopped payment, or has stopped and not resumed payment of its commercial paper for a period of fourteen days.

A moneyed, business or commercial corporation may be forced into bankruptcy under the fifth clause of the twenty-ninth section, if it makes any assignment, gift, sale or conveyance, with intent to delay, defraud or hinder its creditors; or under the eighth clause, if guilty of any of the acts therein specified, without being shown to be either a banker, broker, merchant, trader, manufacturer or miner.

But where the proceeding is based on the ninth clause, as in this case, it is indispensable to aver and prove that the debtor sustained one of these charactors. Has this been averred or proved in this case? The petition does not make any such averment, and is, therefore, fatally defective.

Has this necessary fact been made out by the proof? The characters and powers of a corporation must be determined by its charter. A corporation authorized to carry on a banking business cannot construct or operate a railroad or carry on the business of a manufacturer or common carrier. A municipal corporation cannot, unless expressly authorized by its charter, carry on the business of a banker, miner or manufacturer.

A corporation is an artificial person, the creature of law. It has no powers except what are given by its incorporating act, either expressly or as incidental to its existence and its express powers. *Beatty* v. *Knowler*, 4 Peters, 152; *Perrine* v. *Chesapeake & Delaware Canal Company*, 9 Howard, 172; *Russell* v. *Topping*, 5 McLean, 194; *Straus* v. *Eagle Insurance Company*, 5 Ohio State, 59; *City Council of Montgomery*, v. *Plank Road Company*, 31 Ala. 76; *Brady* v. *Mayor of New*

York, 20 N. Y. 312; *New London* v. *Brainard*, 22 Conn., 522; *Commonwealth* v. *Erie & Northeastern Railroad Company*, 27 Pa. State, 339; *Caldwell* v. *City of Alton*, 33 Ill. 416; *Smith* v. *Morse*, 2 Cal. 524.

No vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate or the persons or property of the corporators. *Salem Milldam Corporation* v. *Roper*, 6 Pick. 23.

A body corporate can only act in the mode prescribed by the law creating it. To enable its agents to bind the company, they must act pursuant to the incorporating act. 2 Cranch. 166.

Express powers granted a corporation must be exercised in the manner pointed out in the statute. *Smith* v. *Eureka Flour Mills Company*, 6 Cal. 1.

The corporation in executing a public work cannot substitute its own more convenient mode of proceeding for that pointed out by its constituting statute. *Regina* v. *Manchester & Leeds Railway Company*, 3 Queen's Bench, 528.

When a specific act is directed to be done by a particular agent of a corporation, it must be done by that agent. *Maddox* v. *Graham*, 2 Metcalf, 56.

These principles and authorities illustrate the rule applicable to the question in hand. If the Alabama and Chattanooga railroad company is a banker, broker, merchant, trader, manufacturer or miner, it must be made so by its charter. The company derives its powers and franchises from the act to charter the Wills Valley railroad, passed by the general assembly of Alabama, and approved February third, eighteen hundred and fifty-two; the act to incorporate the Northeast and Southwest Alabama railroad company, passed by the same general assembly, and approved December twelfth, eighteen hundred and fifty-three; and an act, also passed by the general assembly of Alabama, relating to the Wills Valley railroad company and the Northeast and Southwest Alabama railroad company, approved November eighteenth, eighteen hundred and sixty-eight; which last named act

authorized the purchase by the former company of the property and franchises of the latter. Said last named act also authorized the Wills Valley railroad company, after said purchase, to change its name to "The Alabama and Chattanooga railroad company;" and further provides that the Alabama and Chattanooga railroad company should exercise all the corporate authority and functions, rights and privileges of both the Northeast and Southwest Alabama railroad company and the Wills Valley railroad company. Therefore we must consult the charters of the two latter companies to ascertain the powers and franchises of the Alabama and Chattanooga railroad company. An inspection of these charters shows that neither of these companies was authorized to carry on the business of a banker, broker, merchant, trader or miner; and being neither by the law of its creation, it cannot be made such by any act of its officers, agents or employes, or even by a vote of its board of directors.

The twenty-second section of the act to incorporate the Northeast and Southwest railroad company provides, however, that "said company shall have power to erect and carry on machine shops, iron furnaces, foundries and rolling mills, and such other mechanical works as may be necessary, and to make, manufacture and furnish iron and other materials for the full equipment of the road, and to continue to make and manufacture the same under the provisions of this charter either for sale or their own use." Clearly this gives authority to the road to become a manufacturer—but this authority does not make the company a manufacturer unless it actually engages in the business of manufacturing. The business must also be carried on for the purpose of selling the products manufactured and not for the exclusive use of the company, to make it a manufacturer within the meaning of the bankrupt act. A planter who manufactures plows and other agricultural implements, or weaves cloth, as many do, for his own use and not for sale cannot be considered a manufacturer, nor can a railroad company that makes iron

rails and cars for its own exclusive use, and not for sale, be deemed a manufacturer. It might do this under its general power to construct, equip and operate a railroad without any special grant for that purpose. If no mode is prescribed for the exercise of a power, the grant of which is clearly defined, the corporation may adopt such mode as in its judgment will secure the purpose contemplated.

No proof was submitted to the bankrupt court nor has any been submitted to this court to show that the corporation chartered by the state of Alabama as the Alabama and Chattanooga railroad company has ever carried on the business of a manufacturer. Some proof was submitted to us, that in Chattanooga, Tenn., a railroad corporation known as the Alabama and Chattanooga railroad company has carried on the business of manufacturing iron rails and cars, but no attempt was made to show that the articles manufactured were for sale and not for the exclusive use of the company. The fair presumption is that this corporation is the one chartered by the state of Tennessee.

It is not alleged in the petition filed in the district court that the Alabama and Chattanooga railroad company was either banker, broker, merchant, trader, manufacturer or miner, and no proof was offered showing that it was either. The inevitable conclusion is that the petitioner ought not to have been adjudicated a bankrupt upon the petition and proofs submitted to the judge of the district court.

We might leave the case here, but an interesting question of practice is raised which we will proceed to notice. The facts touching the charter of this railroad company by the four states of Tennessee, Georgia, Alabama and Mississippi, where its line runs, and where its principal office is, have already been stated.

It has also already been stated how the order to show cause, issuing from the bankrupt court, was served. It is objected that this service was defective and void.

The bankrupt act, section forty, prescribes how service shall be made in cases of involuntary bankruptcy. A copy

of the petition and order to show cause shall be served on such debtor by delivering the same to him personally, or by leaving the same at his last or usual place of abode; or if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct.

By the words "if such debtor cannot be found," we understood "if he cannot be found within the jurisdiction of the court." We do not understand that the debtor may be served, or that the marshal is compelled to serve him in another jurisdiction, even when he knows precisely where he may be found. The words "not found" have a well settled technical meaning, and mean not found in the jurisdiction of the court. If no proper officer of this company could be found within the jurisdiction of the court, that did not authorize service out of the jurisdiction. In such case other modes of service must be resorted to. Service may be made at the last or usual place of residence of the debtor. Was the leaving of a copy of the order at the office of the debtor in Chattanooga, Tennessee, such a service as would bring the party into court? A corporation created by the laws of Alabama may carry on business in another state, but cannot be said to have a residence there. In the *Bank of Augusta* v. *Earle*, 13 Peters, 512, held that "the legal person or entity known to the common law as a corporation, can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only by force of law, and that where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation." Can a corporation be said to have a last or usual place of residence in a place where it cannot exist? It has been held that a corporation created by the laws of one state, is not rendered liable to be sued by process served in another state, by the fact that it carries on business in this latter state, and that the process has been delivered to its officers and agents found therein. The bankrupt act requires that the petition shall be addressed to the judge of the judicial district in

which such debtor has resided for the six months next preceding the time of filing the petition. If, therefore, it is claimed that the order to show cause was properly served by leaving a copy at the residence of the company in Chattanooga, Tennessee, it follows that the petition should have been filed in that district and addressed to the judge thereof.

The fact that the Alabama and Chattanooga railroad company is also chartered by the state of Tennessee, as well as Georgia, Alabama and Mississippi, does not make it one corporate body, on which service could be made at its residence in any one of those states.

In *Ohio and Mississippi railroad company* v. *Wheeler*, 1 Black. 297, the supreme court "held that a corporation cannot exist as one body under charters from two separate states. It has no legal existence in either state except by the law of the state, and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers conferred. It may be composed of and represent, under the same corporate name, the same natural persons; but the legal entity or person which exists by force of law can have no existence beyond the limits of the state which brings it into life and endows it with its faculties and powers. The president and directors of the Ohio and Mississippi railroad company is therefore a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio."

The result is that service was made neither personally nor at the last or usual place of residence of the debtor. As no other service was attempted, there has been no valid service.

It is said that unless the service made is held good there can be no service in this case. We do not so construe the law. Provision is made for service in just such case as this. If the debtor cannot be found, or his place of residence ascertained, service may be made by publication. It is certain that if the jurisdiction of the district court over this case can be maintained, the residence of the debtor is in this

district. If the place of that residence cannot be ascertained, as if there is no office of the company within the district and it is uncertain or unascertained where the process should be left, and no person representing the corporation on whom service can properly be made, can be found in the district, then service by publication may and should be resorted to. We think it clear that service upon an officer of the corporation, out of the district and state and circuit, or service at the supposed residence of the corporation, also out of the district and state and circuit, is defective and invalid.

Whether this corporation has any residence at all in this district is a question which admits of debate, but the proof upon this point is meagre, and it is unnecessary to pass upon it.

The adjudication of bankruptcy in the bankrupt court was upon default of the debtor and upon a fatally defective petition. Even if the defect in the petition could be cured on this hearing by proof to establish the act of bankruptcy not averred in the petition filed in the bankrupt court, we think the proof submitted to us fails to show any act of bankruptcy on the part of the debtor. We are also of opinion that no sufficient service was made upon the debtor.

For these reasons the decree of the district court for the middle district of Alabama, sitting in bankruptcy, adjudging the Alabama and Chattanooga railroad company a bankrupt, is reversed. The custodians appointed under said decree will deliver without delay all the property of said company which they have taken into possession by virtue of that decree, and the petition of William A. C. Jones to have said company adjudged as a bankrupt, will be dismissed at his costs.

UNITED STATES DISTRICT COURT—CALIFORNIA.

A petition was filed by a creditor of the late firm of S. & Co., charging an act of bankruptcy by S. as surviving partner, and praying that he be adjudged a bankrupt, as an individual and as such surviving partner.

To this petition objections in the nature of a demurrer were interposed, on the ground that the court has no authority to administer upon the joint estate, unless the firm be declared bankrupt, and that this cannot be done because it has been dissolved by the death of one of its partners, and because it is admitted that the estate of the deceased partner is amply sufficient to satisfy all his debts, both individual and joint.

Further, that a bankrupt cannot be discharged from partnership debts, unless the other partners are brought in and the firm adjudged bankrupt, and that inasmuch as the alleged act of bankruptcy was committed in respect of a partnership debt, and the petitioning creditor is a creditor of the firm, debtor cannot be adjudged a bankrupt in his individual capacity. Demurrer overruled, adjudication granted and a warrant issued to the messenger directing him to seize the separate estate as well as the estate of the firm in the hands of the bankrupt.

In re R. STEVENS.

HOFFMAN, J.—The petition in this case is filed by a creditor of the late firm of Stevens & Co., charging an act of bankruptcy committed by Stevens, as surviving partner of the firm, and praying that he be adjudged a bankrupt as an individual and as such surviving partner, and that a warrant issue against his separate property and the joint estate in his hands as such surviving partner.

To this petition objections in the nature of a demurrer have been interposed.

It is urged that the court has no authority to administer upon the joint estate unless the firm be declared bankrupt, and that this cannot be done, because it has been dissolved by the death of one of its partners, and because it is admitted that the estate of the deceased partner is amply sufficient to satisfy all of his debts, both individual and joint.

It is also urged that a bankrupt cannot be discharged from partnership debts unless the other partners are brought in and the firm adjudged bankrupt, and that inasmuch as the alleged act of bankruptcy was committed in respect of a partnership debt, and the petitioning creditor is a creditor of the firm, he cannot be adjudged a bankrupt in his individual capacity.

It has been held in several cases by the learned judge of the southern district of New York, that when there are firm debts and firm assets the firm must be declared bankrupt by either voluntary or involuntary proceedings before any member of it can be discharged from its liabilities; but that this applies only to actually existing partnerships, or to cases where there are firm assets, and not copartnerships terminated heretofore by bankruptcy, insolvency, assignment or otherwise. *In re* Winkens, 2 N. B. R. 113; *in re* Frear, 1 N. B. R. 201; *in re* Little, 1 N. B. R. 74; *in re* Shepard, 3 N. B. R. 43.

I have not been able to understand the precise grounds on which these decisions are based.

Undoubtedly where the firm of which the petitioner is a member is bankrupt, there should be an adjudication in bankruptcy against the partners composing it, and an assignee appointed in that proceeding before the partnership assets can be reached.

But cases often occur where a partner may be bankrupt while the remaining partners, as individuals, and even the firm itself are entirely solvent. In such case no adjudication against the firm could be made.

But the bankrupt partner would nevertheless have an unquestionable right to be discharged from all his debts provable under the act. See *in re* Frear, 1 N. B. R. 201.

But if on his petition setting forth firm debts and firm assets no adjudication can be made until the remaining partners are brought in, he will be deprived of the benefit of the act; for the partners being solvent, no adjudication can be made against them or the firm.

The bankrupt act clearly provides, that one partner may be discharged from his joint as well as several debts without impairing the liability of his copartners.

Section thirty-three provides that no discharge granted under this act shall release, discharge or affect any person liable for the same debt, or with the bankrupt, either as partner, "joint contractor, endorser, surety, or otherwise;"

and such would no doubt be the law independently of this provision. 1 Gray, 633; 5 Cush. 613.

The case, therefore, provided for by the statute, is evidently one where one partner becomes bankrupt while the others remain solvent—and it is their liability which it is intended to preserve.

In the case at bar no proceedings can be taken under the thirty-sixth section and general order No. XVIII. The partnership has ceased to exist, having been dissolved by the death of one of its members. It is not insolvent, for it is admitted that the deceased partner's estate is sufficient to satisfy his debts, joint and separate. Nor, if it were otherwise, are there any means of bringing in his executors, or of taking possession of his separate estate, which is in the course of administration in the probate court.

But all the joint assets are in the hands of the surviving partner, who holds the same for all purposes of administration until the debts are paid. The debts due the partnership must be collected in his name, and he alone can be sued by the firm creditors.

If, then, while clothed with these rights and charged with these duties, he commits an act of bankruptcy, I see no reason why the creditors cannot invoke the aid of a court of bankruptcy to take out of his hands the joint assets as well as his separate estate, and distribute them among his creditors. If in respect to his separate estate, he had made a fraudulent assignment, given a preference or suffered his commercial paper to be dishonored, there can be no doubt that he could be adjudged a bankrupt in his capacity as an individual. It would be a strange analomy if on such an adjudication, where the debts owed by him as a partner are his own debts as much as those contracted by him separately, and where the firm assets in his possession are his own property to the extent of his interest in the firm, that the court should have no power to take possession of the joint assets, but must leave them in his hands to be disposed of in fraud and absolute defiance of the provisions of the bankrupt act.

Under the Massachusetts insolvent law, on which the bankrupt act is based, no doubt seems to have been entertained as to the right of a surviving partner to institute proceedings in bankruptcy which will include the estate of the firm. *Adams Bank* v. *Rice*, 2 Allen, 480.

In *Durgin* v. *Coolidge*, 3 Allen, 544, the court says: "The surviving partner is entitled to have possession of all the partnership property. During the lifetime of the partners either of them might make application to the court of insolvency, upon which legal proceedings might be instituted and pursued against the estate of the partners. It is, therefore, quite clear that upon the death of one of the partners, the survivor may rightfully apply to the court of insolvency by petition, and that thereupon the proceedings may be had for the sequestration of the partnership property and the payment of the debts due the partnership creditors."

But the warrant will not authorize the seizure of the separate estate of the deceased partner. If this proceeding can be taken by the surviving partner, it necessarily follows that when he had committed an act of bankruptcy, the same proceedings can be taken against him by either a joint or separate creditor.

The apprehension expressed by counsel that the discharge of the surviving partner might operate to release the estate of the deceased partner from liability, seems entirely groundless.

Such a result would be in direct contravention of the provisions of the thirty-third section of the act; nor could the terms of the discharge bear any such interpretation, for the decree would merely declare that Russell Stevens was discharged from all his debts provable under the act.

Some question was made at the hearing as to whether the act charged in the petition was an act of bankruptcy under the law.

It appears that the firm had been engaged in the business of manufacturing lumber. The surviving partner gave to a creditor of the firm a draft or bill of exchange on its

agents, which, on presentment, was dishonored and remained unpaid for more than fourteen days. The draft was undoubtedly "commercial paper" within the meaning of the law. It was paper governed by the rules which are founded on the custom of merchants. *In re* Chandler, 4 N. B. R. 66.

Nor do I think that the circumstance that the manufacturing firm had been dissolved by the death of a partner, and that the survivor was engaged in settling its affairs and closing up the business, divested the latter of his character as manufacturer, especially when the debt which formed the consideration of the draft was a debt contracted by the firm in the course of its manufacturing business.

It was stipulated on the hearing that if the court should be of opinion that the objections raised by the demurrer were untenable, an adjudication should be entered without a reference to the register to ascertain the facts. The adjudication will therefore be made, and the warrant will direct the messenger to seize the separate estate as well as the estate of the firm in the hands of the bankrupt.

JOACHIMSEN & HUNT for petitioner.

J. B. SOUTHARD, for assignee.

December 27, 1870.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A demurrer to the petition of the bankrupt's assignee, to recover property fraudulently conveyed by one who claims the property by virtue of a voluntary assignment of the debtor, will not be sustained simply on the ground that more than two years have elapsed since the cause of action accrued, and that therefore, it is barred by section two of the present bankrupt act. Respondent required to pay the cost of the demurrer, and allowed time to put in an answer to the assignee's petition.

In re P. H. KROGMAN.

Petition of Henry M. Duffield, assignee, against Gardner K. Grout to recover certain property and books of account alleged to have come to his possession under a fraudulent and void voluntary assignment for benefit of creditors, and

on account of which Krogman was adjudged a bankrupt. Assignment to Grout alleged to have been made October fourteenth, eighteen hundred and sixty-seven. Petition for adjudication of bankruptcy filed in January, eighteen hundred and sixty-eight, and adjudication passed February third, eighteen hundred and sixty-eight, and assignee appointed February twenty-eighth, eighteen hundred and sixty-eight, who resigned, and resignation was accepted, and the petitioner was appointed assignee in their stead November twenty-eighth, eighteen hundred and seventy. This petition was filed February first, eighteen hundred and seventy-one, more than two years after appointment of assignee.

Grout demurs to this petition on the ground that, more than two years having elapsed since the cause of action accrued, the same is barred by section two of the bankrupt act.

LONGYEAR, J.—The petitioner contends that the limitation provided by section two does not apply, because

I. This is not a suit, a "suit at law or in equity," within the meaning of said section two, and

II. Grout is not a "person claiming an adverse interest touching the property and rights of property" "of said bankrupt transferable to or vested in the assignee," within the meaning of said section.

FIRST. As was held by this court *in re* Norris, 4 N. B. R. 10, the assignee has his option, in a case like the present, to proceed in the bankruptcy court, in the district court or in the circuit court. Now, if he had proceeded in either of the two last mentioned courts, the forms of proceeding would necessarily have been such that there could have been no question as to its being a "suit" within the meaning of section two. I think it can make no difference with the application of the limitation provided by section two, because the assignee has chosen to proceed in the bankruptcy court, and has thereby necessarily adopted a different form of proceeding. It is a "suit at law," nevertheless, within the

spirit and meaning of said section, and therefore, so far as that question is concerned, the limitation applies.

SECOND. So far as appears by the allegations in the petition, and that is all the guide we have in the present aspect of the case, all the claim set up by Grout is

I. That the amount claimed by the assignee is much larger than what he is liable for, and

II. That he sets up a claim for services which the assignee disputes. Nowhere in the petition does it appear that Grout in any manner sets up any interest touching the property itself, or the rights of property of the bankrupt, adverse to the assignee.

What Grout disputes is simply the *amount*, and not the assignee's *interests* and *rights* touching the property. Neither could he as voluntary assignee under a void assignment, have or claim, merely as such, any such adverse interest as against the assignee in bankruptcy; and Grout's claim for services is clearly not a claim of interest, adverse or otherwise touching the property, &c. It is simply a personal claim of indebtedness against the estate, and can in no event constitute a lien upon the property and books of account in his hands, under the circumstances of this case as developed in the petition. See also *Sedgwick, assignee* v. *Casey*, 4 N. B. R. 161, recently decided in southern district of New York, in which the above views are confirmed.

The cause of action is therefore not such an one as falls within the scope of the limitation proved in section two, and for that reason the demurrer is not well grounded.

The demurrer is overruled with costs, and the respondent Grout, is given —— days to put in his answer to the petition.

HENRY M. DUFFIELD, petitioner in person.

MR. GRIFFIN, (of Moore and Griffin,) for Grout.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

On filing the specifications in opposition to a bankrupt's discharge, the hearing upon the petition is at once transferred into court by section four of the bankrupt act; therefore there cannot be any examination of the bankrupt by the creditors before a register, on the application by the bankrupt for a discharge. If creditors desire a further examination of the bankrupt before the register, to be used by them in opposing his discharge, they must proceed under section twenty-six of said act.

In re S. F. & C. S. FRIZELLE.

I, Benjamin J. Brown, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in this matter before me, a question arose pertinent to the proceedings, which was stated and agreed to by the counsel for the opposing parties, to wit: J. M. Smith and George B. Brooks, who appeared for the assignee and sundry creditors, and John J. Wheeler, who appeared for said bankrupt.

On the joint petition of said bankrupts, it was ordered that a hearing be had thereon on the thirty-first day of December, eighteen hundred and seventy. By consent the hearing was adjourned from time to time to the fourth day of March inst. On that day counsel for the assignee and creditors asked to examine Seymour F. Frizelle, one of said bankrupts, as to the disposition of his property, to which counsel for said bankrupt objected on the ground that he had already been examined by them upon the subject; which, as a matter of fact, is true, said bankrupt having been examined at great length in the month of April, in the year eighteen hundred and seventy, by the same counsel. The objection being made, I declined to proceed with the examination except on cause shown. Thereupon Mr. Smith made the subjoined affidavit, which, in the opinion of the register, did not show such cause. If the right to enter upon the examination had existed at the day fixed for the hearing, it could of course be exercised on any day to which it was adjourned—the hearing being continuous. The showing, therefore, as to the inadvertence was immaterial; and the fact of

any examination having occurred at the hearing assumed in the affidavit was not well founded. There had been no "former examination" or any examination whatever at the hearing.

The register is not only desirous, but even anxious, that the fullest opportunity should be allowed for the examination of a bankrupt, but he is constrained to follow a rule which he deems not only reasonable, but well established. *In re* Adams, 2 N. B. R. 92; *in re* Isidor, 1 N. B. R. 33.

The bankrupt took the oath prescribed by section twenty-nine of the bankrupt act, and the hearing was adjourned to the eighteenth instant, at nine o'clock A.M., without prejudice.

BENJ. J. BROWN, *Register.*

Irving M. Smith, being duly sworn, says that he is the attorney of Farrand, Sheley & Co., Dr. D. Jaynes & Sons, J. C. Ayer & Co., and other creditors of said bankrupts; that on the former examination of said bankrupt, upon his application for a discharge, he, deponent, inadvertently omitted to examine said Seymour F. Frizelle upon a material point bearing upon the question as to whether he is entitled to the discharge asked for, and that as the attorneys for said creditors, he now desires to proceed with said examination, and further says not.

IRVING M. SMITH.

Sworn and subscribed to before me, this fourth day of March, eighteen hundred and seventy one.

BENJ. J. BROWN, *Register.*

LONGYEAR, J.—On the entry of appearance of creditors to oppose a discharge, all proceedings upon the petition for discharge are suspended until specifications shall be filed under section thirty-one, and rule twenty-four, except perhaps that the oath to be taken by the bankrupt to obtain his discharge as prescribed by section twenty-nine, may be administered.

In re McVey, 2 N. B. R. 85. On filing the specifications, the hearing upon the petition is at once transferred into court by operation of section four. It will be seen, therefore, that there could not be any examination of the bankrupts, or either of them, by creditors, on the application by the bankrupts for a discharge, before the register; because, if no specifications had been filed, and the time had not expired for filing the same, all proceedings upon the application were suspended. If the time for filing the specifications had expired, then the case stood as if no appearance to oppose had been entered, and of course no examination of the bankrupts by creditors could be called for by way of such opposition. If specifications had been filed, then the application was no longer before the register. So far, therefore, as the motion was for the examination of the bankrupts on their application for a discharge, the same was properly denied by the register. *In re* Mawson, 1 N. B. R. 33; *in re* Puffer, 2 N. B. R. 17.

If the creditors desire a further examination of the bankrupts, or either of them, before the register, to be used by them in opposing a discharge, or for any other purpose, they must proceed under section twenty-six. Such a proceeding may be entertained by the register, and any question arising thereon, proper to be certified, may be certified by him. The granting of such an application is, however, entirely in the discretion of the court, and I should be very much inclined to adopt the views and opinion of the register as to the justice and propriety of allowing such further examination, all previous examinations having been had before him, and the circumstances having a bearing upon the question being personally known to him.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A petition by a secured creditor for leave to foreclose his mortgage, will be dismissed where no notice is shown to the court to have been given to the assignee of such application, and no proof made of the existence of the debt nor the amount.

In re S. F. FRIZELLE.

Application of Helen L. Derby, a secured creditor, for leave to foreclose her mortgage.

The petition states that the petitioner holds a mortgage on certain real estate of the bankrupt, given by him before his bankruptcy, for eight hundred and forty-nine dollars, purchase money, in part of the mortgaged property, and that the property is worth not to exceed nine hundred dollars, and that the debt for which the mortgage is so held has not been proven in the bankruptcy proceedings.

No notice of the application is shown to the court to have been given to the assignee, and no proof is made of the existence of the debt, or of its amount. To grant permission for a sale without previous proof of the claim, would be to assume as proved the facts upon which the right to the order is dependant.

The court, therefore, holds that the mortgage debt must be first proved in the usual manner before the register, in the bankruptcy proceedings.

It must be so proven as a secured claim. No dividends of course can be made upon it until after the property mortgaged has been sold, and the proceeds deducted from the debt as proven, when dividends may be made upon the balance, if any. This is the true meaning of section twenty, deduced by construing the second paragraph and the last clause of the last paragraph, and section twenty-two together.

After the claim has been thus duly proven in the bankruptcy proceedings, the creditor may, on due notice to the assignee, apply to the court to have the mortgaged property sold. See also *in re* Bigelow, 1 N. B. R 186; *Davis* v. *Carpenter*, 2 N. B. R. 125; *in re* Ruehle, 2 N. B. R. 175; *in re* Smith, 2 B. N. R. 98.

For the reasons above set forth the petition is dismissed.

UNITED STATES DISTRICT COURT—TENNESSEE.

A. was adjudicated a bankrupt on the petition of creditors. Sometime thereafter the brother of the bankrupt filed his petition, alleging that the bankrupt died before the adjudication; that the petitioner had been served with an injunction restraining him from interfering with, or disposing of, the property of the said bankrupt.

This petition was answered by alleging, among other things, that the bankrupt had absconded and that the petitioner and others had undertaken to conceal the property from creditors, and demanding proof of death.

The court decided that the petition must be dismissed. That there was no party to a creditor's petition except the petitioning creditor and the bankrupt; that the service of an injunction on any person or any number of persons, did not make them parties to the proceedings, although any one served might, by petition or on motion, have a wrongful injunction dissolved; this, however, did not give him the right to contest or vacate the adjudication, that being a matter in which he could have no interest.

KARR v. *WHITTAKER et al.*

TRIGG, J.—On the second day of May, eighteen hundred and sixty-eight, the defendants filed a petition against Charles C. Karr, asking an adjudication in bankruptcy against him on the ground, among others, that he had made a fraudulent preference of Wm. Karr in a trust sale for his benefit to one E. C. Law, of the steamboat "Goldfinch," and on the eighth of October, eighteen hundred and seventy, he was adjudicated bankrupt. O. F. Prescott, one of the defendants, was elected assignee, and an assignment was executed by the register.

On the twenty-first of March, eighteen hundred and seventy-one, Wm. Karr filed this petition in the district court, alleging the filing of the petition in bankruptcy and the adjudication; that Prescott and the defendants had procured the adjudication fraudulently; that there had been no publication according to the orders of the court, and that before the adjudication, to wit, on the eighth of March, eighteen hundred and seventy, the said Chas. C. Karr had died; that the petitioner had been served with an injunction under the bankruptcy proceedings, restraining him from interfering with or disposing of the property of the said Chas. C. Karr; that he was advised that, being a party to the said petition and having been served with process of injunction, he had a right to file this petition to vacate and annul the said adjudication; that

he was further advised that the said adjudication was void by reason of the promises, &c., &c.

The injunction referred to in the petition was issued at the time of filing the creditor's petition on the fiat of the judge under the fourth section of the bankrupt act. It was addressed to C. C. Karr, and restrained him "and all other persons" from transferring or disposing of any part of the debtor's property. A direction was endorsed on it to the marshal by the creditor's solicitor, to serve it on William Karr and it was so served.

This petition was answered, denying fraud and containing counter charges of fraud in the running off of the Goldfinch, and the burning her to obtain policy of insurance; alleging that C. C. Karr had absconded, and that William Karr and others had undertaken to conceal the property from creditors, and demanding proof of death, &c., &c.

At the May term, eighteen hundred and seventy-one, of the court, defendant's counsel moved to dismiss the petition on the ground, among others, that Wm. Karr had no right to file it, not being in privity to C. C. Karr, nor, as he assumed, any party to the original proceedings in bankruptcy.

Held, That the petition must be dismissed; that there was no party to a creditor's petition except the petitioning creditor and the bankrupt; that an injunction under it might be served on any person, or any number of persons, but that such service did not make them parties to the proceedings; that any one served might by petition or on motion, have a wrongful injunction dissolved, but that he would have no right to contest or vacate the adjudication; that that was a matter in which he could have no interest; that in this case, if Wm. Karr had lost possession of his property,—which he did not allege—he could by proper proceedings recover it of the assignee; that, if a creditor, he could prove his debt; that if he was a *bona fide* mortgagee, he could enforce his mortgage by proper proceedings; that if the adjudication was void, as claimed, and the assignee held property under it, the rightful owner had ample remedy against

the assignee for its recovery, or he might, in a proper proceeding vacate and annul the adjudication, but that Wm. Karr showed no such right in this petition. He did not claim any right or interest in the property of C. C. Karr, nor did he seek to assert any claim to any specific property in the hands of the assignee, but only claimed that being a party to the proceedings in bankruptcy, and having had an injunction served on him, and being charged with fraud he had the right to contest the adjudication and ask to vacate it. This he could not do without some priority of interest in the property of C. C. Karr.

The court declined to decide the question of the jurisdiction of the district court to supersede proceedings in bankruptcy, but intimated that the jurisdiction would perhaps be found in the supervisory powers of the circuit court under the second section, and also reserved any opinion as to the effect of the death of the bankrupt in a case like this, it being unnecessary to determine these questions until some one was before the court who had the right to make them.

CHAS. A. CHOATE & H. C. YOUNG, solicitors for petitioner.

H. CLAY KING, with RANDOLPH, HAMMOND & JUDSON, for the defendants.

UNITED STATES DISTRICT COURT—NEW JERSEY.

The debtor, on voluntary petition, was adjudged a bankrupt on the seventeenth of February, eighteen hundred and sixty-eight, but neglected to make application for final discharge, until the third of May, eighteen hundred and sixty-nine. It appearing to the court that no assets had come to the hands of the assignee, and that the application for discharge was not made within one year from the date of adjudication, his discharge was refused. The debtor afterwards filed a new petition in bankruptcy and was adjudged a bankrupt, and on motion of the creditors to vacate the adjudication and strike the petition from the file,

Held, that the refusal of the court to grant a discharge upon that ground, was no bar to the new proceedings.

In re J. W. FARRELL.

NIXON, J.—This is an application to vacate the adjudication of bankruptcy made in the case, and to strike the petition from the files of the court.

The grounds alleged in support of the application are,

that Farrell had filed his petition in this court on the tenth of February, eighteen hundred and sixty-eight, for a discharge from his debts under the bankrupt law; that the case regularly proceeded until the seventeenth of November and the twenty-second of December, eighteen hundred and sixty nine, on which date specifications were filed opposing his final discharge upon various grounds; that on the twenty-eight day of December, eighteen hundred and sixty-nine, after argument by counsel, the court gave a decision denying the bankrupt's right to a discharge, and refusing to grant the same; and that this refusal is a bar to any new application by the bankrupt debtor for the benefit of the act.

The counsel for the bankrupt resists the application, for the reason that the court did not refuse the discharge for any matters of substance affecting the conduct of the bankrupt, but upon a mere matter of form, arising from his neglect to apply for his final discharge within the time limited by the law; and that he ought not to be precluded from filing a second petition when his discharge has been refused, upon any ground except those specifically defined in the twenty-ninth section of the bankrupt act.

It appears that in the former proceedings Farrell was adjudged a bankrupt on the seventeenth day of February, eighteen hundred and sixty-eight; that no assets came to the hands of the assignee, and that the bankrupt filed an application for a discharge from his debts on the third of May, eighteen hundred and sixty-nine; more than one year after the adjudication. Ten specifications were filed by the opposing creditor against the bankrupt's discharge, all of which, except the last two, are mentioned in the twenty-ninth section as valid reasons for withholding a discharge. The ninth and tenth had reference only to the time within which he was permitted to make his application; and his Honor, the late judge Field, declined to hear any argument upon the other specifications as a useless waste of time, holding that the proper construction of the first clause of the twenty-ninth section required the bankrupt to apply for his discharge within one

year of the date of adjudication, in all cases where there were debts proved, or no assets had come to the hands of the assignee.

The case then presents the question whether a bankrupt, after his discharge has been refused for any cause, may again apply to the court for the benefit of the bankrupt law?

This question can be best answered by considering the nature and character of these bankruptcy proceedings. They have been held to be, and are, in the nature of a suit in which the bankrupt appears as plaintiff and the creditors are defendants; the plaintiff asking the court for a judgment against all and each of the defendants, discharging him from his indebtedness to them. The defendants have their day in court, are entitled to be heard at all stages of the proceedings; and when the bankrupt files his application for a discharge from the payment of his debts, any single creditor may make opposition thereto, by entering his appearance and putting on file specifications against the discharge.

These reasons may be for some unlawful or fraudulent act committed by the bankrupt himself, antecedent to, or during the course of, the proceeding; such, for instance, as are enumerated in the twenty-ninth section as proper grounds for withholding a discharge, or they may be for some irregularity in the proceedings, or want of diligence on the part of the bankrupt, or want of jurisdiction on the part of the court.

The ground for refusing the discharge in the present case, was that the bankrupt did not apply for it within one year after the date of adjudication of bankruptcy, as the twenty-ninth section, fairly interpreted, demands. It did not involve the merits of the issue between the bankrupt and his creditors; but it was simply a question of statutory construction as to whether the court had the power of making a decision upon the merits, after such a delay on the part of the bankrupt in bringing the matter before it. This question was raised by the creditor in the ninth and tenth specifications, and it was rightly held that the court had no such power, the result being in principle the same as where the plaintiff,

in a suit at law, is non-prossed for not bringing on his case for trial at the next term after the issue joined. He has the costs of the first proceedings to pay, but is allowed to commence again and to continue until he reaches a judgment upon the merits of his case.

The counsel for the petitioner contends that such a construction of the statute is a hardship to the creditor, as it subjects him to the trouble and expense of resisting a discharge a second time upon the new application. But the same objection exists to a non-suit at law, or to a dismissal of a bill in equity, upon technical grounds. He may ordinarily avoid such hardship by waiving all specifications that do not touch the merits of the question of discharge, and may have the judgment of the court solely upon the merits. If he does not choose to rely upon these he ought not to complain if the court allows such new proceedings as may be requisite to reach its judgment upon the real issue between the bankrupt and his creditors.

In the present case, proceedings *de novo* are necessary, and the application to dismiss the petition must be refused.

June 20, 1871.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where an appraisement is exaggerated, although there is no evidence of any depreciation, the proceedings having been commenced after January first, eighteen hundred and sixty-nine, and the debtors not having shown that their assets are or have been at any time since they filed their petition, equal to fifty per cent. of the claims proved against their estate, upon which they are or were liable as principal debtors, and not having filed the assent in writing of a majority in number and value of their creditors, to whom they are or have become liable as principal debtors, and who have proved their claims, discharges are refused.

In re BORDEN & GEARY.

BLATCHFORD, J.—In this case, the debts proved on which the bankrupts are liable as principal debtors, are at the minimum amount, ten thousand seven hundred and sixty-six dollars, and twenty-four cents. Fifty per cent. of this sum is

five thousand, three hundred and eighty-three dollars, and twelve cents. In view of the testimony as to the condition of the stock of goods turned over by the bankrupts when they filed their voluntary petition in bankruptcy, July twenty-first, eighteen hundred and sixty-nine, I must reject the appraisement of such stock made at four thousand, six hundred and six dollars, and sixty-four cents, July twenty-seventh, eighteen hundred and sixty-nine. That appraisement was on the proofs, very much exaggerated. How much it is impossible to say. There is no safe guide but the amount realized for the goods by the assignee. There is no satisfactory evidence that the goods suffered any depreciation in value between July twenty-first, eighteen hundred and sixty-nine, and the time when the assignee sold them, whether before or after they came into the assignee's hands, or that the bankrupts are entitled to have any larger sum taken as the value of such goods, in determining the amount of their assets under section thirty-three of the act, as amended by the act of July twenty-seventh, eighteen hundred and sixty-eight, section one, (15 U. S. Stat. at Large, 227,) than the sum realized by the assignee. This same view, on the evidence, applies to all the property of the bankrupts. The assignee certifies that the proceeds in his hands, of property sold and of debts collected, and the debts uncollected, but in his opinion good and collectable, amount to four thousand nine hundred and thirty-three dollars, and fourteen cents. This amount does not include the expenses of selling the property, but such expenses were only about two hundred and fifty-dollars, and the four thousand nine hundred and thirty-three dollars and fourteen cents is less than the five thousand three hundred and eighty-three dollars and twelve cents, by four hundred and forty-nine dollars, and ninety-eight cents. The proceedings having been commenced after January first, eighteen hundred and sixty-nine, and the debtors not having shown that their assets are equal or have been at any time since they filed their petition equal to fifty per cent. of the claims proved against their estate, upon

which they are or were liable as principal debtors, and not having filed the assent in writing of a majority in number and value of their creditors, to whom they are or have become liable as principal debtors, and who have proved their claims, discharges are refused.

CHENEY & DIXON, for the bankrupts.

C. A. SEWARD & J. B. FOGERTY, for opposing creditors.

June 16th, 1871.

UNITED STATES SUPREME COURT—DECEMBER TERM, 1870.

[Appeal from the United States circuit court for the western district of Texas.]

Where there has been a joint decree against two parties, and one alone asks for an appeal, the appeal will be dismissed unless it appears by the record that the other party had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join.

MASTERSON, Assignee, v. *HOWARD et al.*

MILLER, J.—It is objected by the appellees that there is no valid appeal in this case because, the decree being a joint decree against Herndon and Maverick, Herndon alone has asked for an appeal.

A careful examination of the record satisfies us that the decree is a joint decree, and the appeal is clearly taken by Herndon alone.

It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed.

There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time, the same question on the same record. *Williams* v. *Bank U. S.* 11 Wheat-

on, 414; *Owings* v. *Kincanon*, 7 Peters, 399; *Heirs of Wilson* v. *Insurance Co.*, 12 Peters, 140.

In the case first cited, the court says that where one of the parties refuses to join in a writ of error, it is worthy of consideration whether the other may not have remedy by summons and severance; and in the case of *Todd* v. *Daniel*, 16 Peters, 521, it is said distinctly that such is the proper course.

This remedy is one which has fallen into disuse in modern practice, and is unfamiliar to the profession, but it was, as we find from an examination of the books, allowed generally, when more than one person was interested jointly in a cause of action or other proceeding, and one of them refused to participate in the legal assertion of the joint rights involved in the matter. In such case the other party issued a writ of summons, by which the one who refused to proceed was brought before the court, and if he still refused, an order or judgment of severance was made by the court, whereby the party who wished to do so could sue alone. One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harrassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature. (Brook's Abridgment, Art: Severance and Summons; 2 Rolle's Abridgment, 488; Archbold's Civil Pleadings, 59; Tidd's Practice, 129, 1136, 1169.)

This remedy was applied to cases of writs of error when one of the plaintiffs refused to join in assigning errors, and in principle is no doubt as applicable to cases where there is a refusal to join in obtaining a writ of error or in an appeal.

The appellant in this case seems to have been conscious that something of the kind was necessary, for it is alleged in his petition to the circuit court for an appeal, that Maverick refused to prosecute the appeal with him.

We do not attach importance to the technical mode of proceeding called summons and severance. We should have

held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of appellant, does not prove this. We think there should be a written notice and due service, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest.

Such a proceeding would remove the objections made to permitting one to appeal without joining the other, that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter.

The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested.

We dismiss this appeal with the less regret, as there is still time to obtain another on proceedings not liable to the objection taken to this.

It is ordered accordingly that this appeal be dismissed.

UNITED STATES CIRCUIT COURT—E. D. MICHIGAN.

A debtor conveyed his farm to his wife but did not record the deed until seven years after its execution; during this time, however, he appeared as the owner. Being adjudged a bankrupt, his assignee filed a bill to obtain a conveyance of this property to him (the assignee) for the benefit of the creditors. The wife claimed that the money paid for the property was her's, giving this as a reason why she held the conveyance, and denied any intention of hindering or defrauding her husband's creditors.

The evidence showed that the husband purchased the farm on a contract made to himself, but that after the first installment of purchase money was paid, the property was conveyed to the wife. Further payments were made until about half the amount agreed upon was paid.

At the time the conveyance was made to the wife the bankrupt was considerably in debt, which indebtedness constituted a portion of his liabilities in the bankruptcy proceedings. Almost all of the money paid on the farm was from proceeds of property, the title to which at the time of sale was in the bankrupt, which property was partly paid for by the wife with money earned by herself after her marriage.

The court decided that if a married woman consents to the purchase of property with her means by her husband and in his own name, she cannot afterwards reclaim the property as against his creditors, whose debts accrued while the property was so held by him. A decree entered declaring the property assets of the bankrupt and subject to be distributed under the act for the payment of his debts.

KEATING, assignee, &c. v. *KEEFER.*

Bill to obtain a conveyance and delivery to the assignee of certain assets of the bankrupt, Henry M. Keefer, alleged to be held by the defendant in fraud of creditors. Answer on oath, replication and process.

LONGYEAR, J.—It appears from the pleadings and proofs that on the seventeenth day of August, eighteen hundred and sixty, Henry M. Keefer purchased a farm in Hillsdale county, Michigan, described as follows: the south-east quarter of section twenty-nine, in the township of Hillsdale, containing one hundred and sixty acres of land, more or less, for four thousand dollars, to be paid, one thousand dollars on the first of April, and the balance in installments as specified, and took a contract for the same to himself; and that on the twelfth day of March, eighteen hundred and sixty-one, the one thousand dollars was paid and the land was conveyed to the defendant, then and still the wife of the said Henry M. Keefer, she and her husband giving a mortgage back for

balance of purchase money; that since then payments have been made of the interest, and one thousand dollars more of the principal; that by improvement upon the land and the rise of value in real estate, the same is now worth at least eight thousand dollars, and that at the time the bankruptcy proceedings were commenced, there was upon the said farm personal property of the value of about two thousand dollars.

It further appears that at the time the said land was so conveyed to the defendant, the said Henry M. Keefer was considerably in debt, which indebtedness constitutes a portion of his liabilities in the bankruptcy proceedings.

The bankruptcy proceedings were commenced and the said Henry M. Keefer was adjudged a bankrupt upon his own petition, and none of the said real estate or personal property are included in his schedule of assets.

It further appears that the liabilities of the said bankrupt are nearly two thousand eight hundred dollars and that the assets which were included in his schedule are nearly worthless.

It is claimed by the complainant that the conveyance of said real estate to the defendant was so made, and that the title to said property is now held by her with intent to delay, hinder and defraud the creditors of the said Henry M. Keefer, and ought now to be conveyed to the complainant to be distributed as a part of the said bankrupt's estate.

It is claimed and set up by the defendant that the purchase of said lands and the payments which have been made were with her money and for her, although in the first instance in the name of her said husband, and the same was conveyed to her for that reason and without any intent to hinder, delay or defraud the creditors of the said bankrupt, and that the same belongs to her in her own right; that at the time the said conveyance was so made to her, her said husband was amply solvent and had other property, more than sufficient to satisfy all his liabilities; and that the said personal property has accrued to her since she has owned said farm from her own means, and also belongs to her of

her own right, and consequently that none of said property, real or personal, is liable for her husband's debts.

In this connection the following facts appear: one thousand seven hundred dollars of the moneys which have been paid on the purchase of the farm, were the avails of the sale of a house and three lots in the village and county of Hillsdale, the title to which, at the time of the sale, was in the said Henry M. Keefer. The balance of the moneys which have been so paid, Mrs. Keefer states in her testimony, was derived from the farm and from her earnings selling sewing machines, but what proportion of it was derived from the farm, and what proportion from her earnings, nowhere appears.

The defendant was married to Keefer in October, eighteen hundred and fifty, and soon after, in eighteen hundred and fifty-one, the house and one of the lots, by the sale of which the one thousand seven hundred dollars was raised, were purchased, and the other two lots (as testified to by defendant and by Keefer,) within four or five years thereafter, although the deeds bear a somewhat later date. Keefer made the negotiations for the purchases, and the deeds were made to him, and the title remained in him up to the time the property was sold, which was some time in eighteen hundred and sixty. This village property was paid for with money earned by Mrs. Keefer as a tailoress after her marriage to Keefer. During all this time they kept house, and Keefer supported the family. The tailoring business by which the money was earned was conducted by Mrs. Keefer at their house.

Other facts appearing in the case will be noticed in the course of this opinion.

Upon these facts, two important questions of law arise.

I. At the period of time in question, was property acquired by a woman by her own personal industry after marriage, liable for her husband's debts?

II. When a married woman consents to the purchase of property with her means, by her husband in his own name,

can she afterwards reclaim the property as against his creditors, whose debts accrued while the property was so held by him?

FIRST. The solution of the first question above stated, depends upon the construction to be given to the statutes of Michigan, relative to the rights of married woman in force during the time the events in question were transpiring.

The first of these statutes was passed in eighteen hundred and forty-four, (Laws of Michigan of 1844, 77,) re-enacted in the Revised Statutes of 1846, p. 340, sec. 25, and embodied in the Compiled Laws of 1857, 2d Vol., p. 965, sec. 328, and so far as this question is involved, is as follows: "Any real or personal estate which may have been acquired by any female before her marriage, either by her own personal industry, or by inheritance, gift, grant or devise, or to which she may at any time after her marriage be entitled by inheritance, gift, grant or devise, and the rents, profits and income of any such real estate, shall be and continue the real and personal estate of such female after marriage, to the same extent as before marriage, and none of said property shall be liable for her husband's debts, engagements or liabilities."

This act remained in full force until the act of eighteen hundred and fifty-five, (Laws of Michigan of 1855, p. 420; 2 Comp. Laws, p. 966, sec. 3292,) which, so far as this question is involved, is as follows:

"That the real and personal estate of every female, acquired before marriage, and all property real and personal, to which she may afterwards become entitled by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations and engagements of her husband."

It will be observed in the act of eighteen hundred and forty-four, property acquired by a female *by her own personal industry* is specifically mentioned in regard to property acquired by her *before marriage*, and that while the same qualifications otherwise made in regard to such property,

are retained in regard to property acquired by her after marriage, that as to property acquired "by her own personal industry," is entirely omitted.

This renders it perfectly clear to any mind, that it was the intention of the legislature in the act of eighteen hundred and forty-four, to leave property acquired by a female by her own personal industry *after marriage*, the same as it was at common law, viz., to be the property of the husband, and of course liable for his debts. The use of the words "by her own personal industry," as to property acquired before marriage, and the omission of them as to property acquired after marriage, taken in connection with the fact that other qualifying words are used, and that they are the same in both cases, in my opinion has the same effect as an express exception as to property so acquired after marriage.

I am aware that legislation has since then made advances in this regard, and that in some directions, and perhaps upon the very question now under consideration, broader and more liberal views have obtained. But this will not warrant the court in disregarding the plain and clear intent and meaning of the law in force at the time the events in question were transpiring.

The house and lot first purchased in Hillsdale village were purchased in eighteen hundred and fifty-one, and was evidently fully paid for while the act of eighteen hundred and forty-four was in full force, and before it had been in any manner altered by the act of eighteen hundred and fifty-five, or any other subsequent act. I hold, therefore, that the means used to purchase that house and lot (from the sale of which one thousand seven hundred dollars of the two thousand dollars paid on the purchase money of the farm in question, as we have seen, was in large part derived,) were the means of the bankrupt, Henry M. Keefer, and not those of the defendant, and that the same, and of course the avails of it, was the property of said Henry M. Keefer and liable for his debts.

As to the other two lots, it is not so clear from the evi-

dence, as to when they were actually purchased. The deed for those lots, by which they were conveyed to Keefer, bears date May fourteen, eighteen hundred and fifty-seven, but there is considerable evidence tending to show that the purchase was made a long time before that. Mrs. Keefer in her testimony says, "I bought the house and lot in eighteen hundred and fifty-one. I could not tell exactly when I bought the north lot, but it was three or four years after, and the south lot was bought within four or five years after I bought the first one." She also testifies that she does not remember exactly when she paid for the north lot, and says, "I did not have to pay anything down on it. I don't remember how much I paid in sewing or how much in money. I don't remember when it was paid. It was a good while ago." She also says she does not remember now when she paid for the south lot. "A part of it was paid to Morse," (of whom the purchase was made), "and a part of it went to McCullum" (who made the deed), "but I don't remember how much." Although these lots were purchased of different persons, one of McCullum, and one of Morse, yet McCullum makes the deed for both.

From all these facts and circumstances, I think it fairly presumable that these lots were actually purchased and were held on contract for a considerable time before the deed was given, but how long before the evidence is quite uncertain and by no means satisfactory. On looking into the deed, however, I find in the warranty for quiet and peaceable possession, the following exceptions: "Except as against taxes that may have been assessed on lot number one hundred and twenty-eight, since the year eighteen hundred and fifty-one, and except as against taxes that may have been assessed on lot one hundred and thirty, since the year eighteen hundred and fifty-two." This is somewhat significant, and taken in connection with the other facts in relation to the purchase of these lots, tends strongly to show that these lots had been held by Keefer during all the excepted years, and that they were actually purchased, one in eighteen hundred and fifty-

one or eighteen hundred and fifty-two, and the other in eighteen hundred and fifty-two or eighteen hundred and fifty-three, and under all the circumstances of the case I cannot come to any other conclusion than that they were so purchased. The act of eighteen hundred and forty-four, therefore, and the construction already given it, apply to these other two lots as well as to the house and lot first purchased, and these are held to have been also the property, absolutely, of the bankrupt Henry M. Keefer.

It does not matter that a portion of the consideration or purchase price for the two lots may have been paid after the act of eighteen hundred and forty-four had been altered by the act of eighteen hundred and fifty-five. It does not appear whether such was the case or not. Having found that the property in these lots acquired by the original purchase was the property of the husband, the payment by the wife (if any) towards that purchase of her own money, without insisting upon any agreement for re-payment or conveyance of any interest to her, I think, under the circumstances of this case, if not in all cases, should be deemed conclusive evidence of the gift of the money to the husband without any right on her part to reclaim any interest in the land or in its proceeds on account of such payment as against him or his creditors. (See *Campbell* v. *Campbell, et al.*, supreme court of Michigan, not yet reported.)

This view of the case renders it unnecessary to consider what alterations in the law were effected by the act of eighteen hundred and fifty-five. No opinion is therefore expressed upon that question.

Henry M. Keefer purchased the farm in question August the seventeenth, eighteen hundred and sixty, and took a contract for the same to himself. The consideration was four thousand dollars. One thousand dollars and interest on the whole sum was to be paid April first, eighteen hundred and sixty one, when a deed was to be given and a mortgage taken back for balance of purchase money.

The Hillsdale village property, which has been the subject

of consideration thus far, was sold in February, eighteen hundred and sixty-one for one thousand seven hundred dollars, of which one thousand, or very nearly that, was paid in cash, and the balance in a certificate of deposit of the banking house of McCullum & Co., of Hillsdale. Soon after this, the one thousand dollars received in cash on the sale of the village property was paid on the contract for the farm, and a deed of conveyance was made to the defendant, which deed bears date March twelfth, eighteen hundred and sixty-one. A mortgage was given back for balance of purchase money as provided in the contract, which mortgage was given by the defendant. Henry M. Keefer, the husband, joined with the defendant in the mortgage, but I do not regard that circumstance as of any importance.

The banking house, whose certificate of deposit had been taken in part payment for the village property, failed soon after, and the certificate was not available, but Henry M. Keefer raised the amount from other property and it was paid on the mortgage on the farm. The balance of the two thousand dollars of principal and the interest which have been paid on the purchase of the farm, over and above the said one thousand seven hundred dollars, avails of the village property, has been paid in the main from the issues and profits of the farm.

The village property being, as we have seen, the property of Henry M. Keefer, the use which was so made of the proceeds of the sale of the same, and the vesting of the title to the land in question, in the defendant, constitutes a gift to or settlement upon her of the land, to the same extent and with the same effect as if Henry M. Keefer had made a formal assignment of the contract to her, or the land had been first conveyed to him and then by him conveyed to her. It was undoubtedly entirely competent for Keefer to do this if he had owed no debts, and if it was not done with reference to indebtedness to be incurred in the future. But how is it in the present case.

The statute of Michigan then in force provided, as it does

now, that "every conveyance or assignment in writing or otherwise, of any estate or interest in lands or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, * * * as against the persons so hindered, delayed or defrauded, shall be void."

The supreme court of the United States, in remaking upon the statute of Alabama, which is substantially like that of Michigan above quoted, in the case of *Parish* v. *Murphree*, 13 Cranch, 92, 98 to 100, justice McLean delivering the opinion of the court, makes use of the following language: "If an individual being in debt shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities." "If the facts and circumstances show clearly a fraudulent intent, the conveyance is void as to all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud upon future creditors, it is void under the statute. And if a settlement be made without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void." "But to avoid the settlement, insolvency need not be shown nor presumed."

In the case now under consideration, Henry M. Keefer, according to his own testimony, was owing about nine hundred dollars at the time of the conveyance of the farm to the defendant. Besides this, there was the seven hundred dollars for the certificate of deposit received by him in part for the sale of the village property, which he and defendant both say he owed to defendant. This would make his indebtedness, according to his and defendant's own figures, up to about sixteen hundred dollars. His property at that time,

he says, consisted of forty acres of land which he afterwards sold for seven hundred dollars, and "personal property invoiced in September, eighteen hundred and sixty, to the amount of one thousand, eight hundred dollars to two thousand dollars." The forty acres of land he sold in December, eighteen hundred and sixty, and applied the proceeds, as appears from the evidence, to payment on the mortgage given by defendant on the land in question, on account of the said certificate of deposit. This reduced his liabilities to nine hundred dollars, and his assets to the personal property which invoiced in September previous at one thousand eight hundred dollars to two thousand dollars, and the said certificate of deposit for seven hundred dollars. It appears that this personal property consisted in large part of notes and accounts against various persons, probably for goods sold while he was in business. From these he had been collecting for some time, and it is not to be presumed that what were left were worth anything like their face. At all events they would constitute but a very poor basis upon which to rely for the payments of debts. He does not tell us what the "personal property," besides these notes and accounts, was, or what it was worth. And as to the certificate of deposit, it appears that the banking house had already failed, or at least had made an assignment, and that the same was and still is unavailable.

Under this state of facts I can have no doubt that the transfer to the defendant of the proceeds of the sale of the village property and of the land in question, did seriously impair the means of Henry M. Keefer so as to hinder or delay his then creditors in the collection of their debts.

What has been said thus far, applies only to the indebtedness existing at the time of the transfer. It appears however, that Keefer's present liabilities exceed his then liabilities by some two thousand dollars, which of course have been incurred since the transfers.

In regard to this subsequent indebtedness it is enough to simply state the facts, that the deed to defendant was not

placed upon the public records until some seven years after it was given; that in the mean time Keefer, with defendant's knowledge and apparent consent, appeared in every respect as the owner, buying, selling and mortgaging the personal property, and leasing the farm as his own and in his own name, thus inspiring confidence in his responsibility and enabling him to obtain credit which he probably could not have done if the facts had been understood, and finally that a large amount of his subsequent indebtedness is for matters directly connected with and for the improvement and betterment of the very land here in controversy.

The circumstances of this case are such as to force the conviction upon my mind that the transfers to defendant, and the placing of the title to the land in question in her name were made and done with intent to hinder, delay and defraud not only the then existing creditors of Henry M. Keefer, but his future creditors also.

A decree must be entered in accordance with the foregoing conclusions, and declaring the said farm, together with all the stock, grain and other personal property upon it, except such as the law excepts, assets of the said bankrupt, Henry M. Keefer, and subject to be disposed of and distributed under the bankrupt act for the payment of his debts and the expenses of the bankruptcy proceedings, and for delivery and surrender up to the complainant as assignee of the said bankrupt, of the possession of all said property, except as aforesaid, for the accounting by the defendant of all personal property on said farm at the time the bankruptcy proceedings were commenced, sold, disposed of or converted by her, other than for the necessary keep of the live stock, and for the preservation of said property, and requiring the defendant to execute and deliver all conveyances, releases, assignments, transfers or acquittances necessary to carry said decree into full force and effect, and for costs to the complainant.

KENT, (Walker and Kent,) for complainants.

G. V. N. LOTHROP, for defendant.

UNITED STATES DISTRICT COURT—CALIFORNIA.

Where the holder of a note receives part of the amount of the same from the endorser, he is entitled to prove for the whole amount against the estate of the bankrupt maker, and holds any surplus he may receive over and above the amount of the note in trust for the endorser. If the creditor omits to prove his debt, thus showing he looks to the endorser alone for payment, the endorser is entitled to come in and prove the note against the bankrupt's estate, and receive dividends upon its whole amount.

In re ELLERHORST & CO.

HOFFMAN, J.—A debt was proved in this case by the Bank of British North America against the estate of the above bankrupts, on a note made by the bankrupts and endorsed by Sheldon, Davis & Co. At the time the proof was made, no part of the note had been paid by either the makers or endorsers. Subsequently, however, the endorsers paid to the holder sixty-two per cent. of the amount due, and were released by the holder from the further liability.

It is contended by the assignee that the holder is entitled to be paid a dividend, not on the whole debt proved by him, but only on the balance due after deducting the sixty-two per cent. already received.

As the estate is confessedly indebted in the whole amount of the debt and must pay dividends thereon, it is evident that if the holder is not allowed to prove for more than the unpaid balance due him, the endorser must be permitted to prove for the sum paid by him to the holder; for in no other way can the whole debt be represented.

But the endorser is not permitted to make this proof by the terms of the bankrupt act, nor on general principles should he be allowed to do so in a case like the present.

The provisions of the act, with regard to "persons liable for the bankrupt, as bail, surety, guarantor or otherwise," contemplate two cases.

FIRST—Where the whole debt has been paid and the creditor satisfied by the surety, the latter may prove the debt, or, if it has already been proved by the creditor, the surety may stand in the place of the latter.

SECOND—Where the surety has not paid the whole debt but is still liable for the same or any part thereof, he may, "if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules," etc.

It is evident that the debt to be proved by the surety in this case is not the indebtedness of the bankrupt to him for the amount which may have been paid by him, but the whole indebtedness of the bankrupt to the creditor; and he can make this proof only in case the creditor has omitted to prove. The proof must also be "in the name of the creditor," or otherwise, as provided by the rules which shows even if the preceding language was less explicit, that the debt to be proved is the original debt due the creditor. This provision is the necessary consequence of the preceding clause, and indispensable for the protection of the surety. For not having satisfied the whole debt, he cannot prove under the first clause; and if the creditor who has been in part satisfied should choose not to prove the surety who has paid part and is liable for the balance, would be deprived of all share in the bankrupt's estate.

The two clauses together secure the attainment of justice in all cases.

By the first, the surety who has discharged the debt is subrogated to the rights of the creditor who he has paid.

By the second, the creditor may prove the whole debt. The surety cannot in such case prove, for that would be to allow the same debt to be proved, in part, twice. But the creditor, after receiving in dividends satisfaction of the balance due him, will hold, as trustee for the surety, any dividends received by him in excess.

But if the creditor omits to prove, the surety may do so, and will hold any dividends he may receive to meet his liability to the original creditor.

The estate will thus have paid dividends only on the true amount of the indebtedness. The creditor who has the double security of the bankrupt's liability and that of the

surety will have been satisfied, while the surety will have been reimbursed either through the creditor who has proved, or directly by himself proving the debt in the creditor's name, that proportion of the debt he has paid or is liable for, to which, as a creditor of the bankrupt, he is entitled.

But this result can be attained only by allowing the creditor, who has been partly paid by the surety, to prove and receive dividends on the whole debt, or the surety, who, in case of omission by the creditor, proves in his name, to make like proof and receive like dividends.

By refusing to allow a surety who has made a part payment, to prove, except where the creditor omits to do so, the statute does him no wrong. Whatever the creditor receives in dividends diminishes *pro tanto* the surety's liability, and is equivalent to a payment made on his account and for his benefit. Even if he were permitted to prove, he would have no right to appropriate the dividends—for his duty would be to turn them over at once to the creditor for whose debt he is surety—and he would no more be at liberty to withhold such payment than he would have been at liberty, had there been no such bankruptcy, to refuse to pay over to the holder any sums which the maker might pay him on account of the debt.

As thus he has no right to receive any dividends from the estate until the creditor is satisfied, the statute very properly denies him the right to prove against it, unless the creditor by omitting to prove has impliedly consented that he should do so, and by renouncing any claim against the estate has been content to look exclusively to the surety's liability.

But when the creditor has insisted on the double liability he has secured, the surety has no right to intercept any sums which the creditor can collect from the bankrupt's estate, or to diminish the fund to which he has a right to look for satisfaction. It is only when the holder is fully satisfied that the surety can urge any claim to dividends payable on the original debt of the bankrupt.

Nor does the creditor, even though he should be paid in full, obtain any "preference."

The estate being liable for the whole debt pays in dividends only the proper *pro rata* share of the assets.

The creditor is paid in full, because, by reason of the relations between himself and the surety, he has a right to intercept and appropriate the dividends which otherwise would go to the latter.

In the case at bar the surety had not satisfied the debt, nor had the creditor omitted to prove. The former was, therefore, not entitled to prove and the proof was properly made by the creditor, who must receive dividends on the whole amount, holding any excess of dividends above the sum necessary to satisfy the unpaid balance due him, in trust for the surety.

These conclusions, apparently so agreeable to reason, are abundantly sustained by authority.

In *ex parte* Wildman, Lord Hardwicke said: "The petitioner had received nothing under the composition at the time he proved his debt under the commission of bankruptcy, and was therefore admitted a creditor for the whole. "But before a dividend he receives two shillings and six pence in the pound under the composition of the acceptors of the bills. * * * * The assignees say he shall be paid a dividend only on the sum left after deducting the two shillings and sixpence. But this would be taking away from a man the double security he had, and which he may make use of in law and equity till he has satisfied his whole debt." 1 Alky. 110. See, too, *ex parte* Dyer, 6 Ves. 9; *ex parte* Adam, 2 Rose, 36; *ex parte* Bank of Scotland, 2 Rose, 197; *ex parte* Turner, 3 Ves. 243; *ex parte* De Laslet, 1 Rose, 10; *in re* Samuel N. Babcock, 3 Story R., 399.

The decision of the register is therefore sustained.

UNITED STATES DISTRICT COURT—W. D. MISSOURI.

Where there is no dispute as to the validity of judgments under which executions were issued and levy made, the execution creditors are entitled to satisfaction out of the proceeds of the goods levied on by the sheriff, and afterwards seized by the United States Marshal under a warrant in bankruptcy.

SWOPE, et al. v. *ARNOLD, assignee.*

Voluntary appearance by the parties.

The petition alleges that certain judgments were obtained by plaintiffs against Marks Lesem at the March term, eighteen hundred and sixty-eight, of the Miller county circuit court; that executions issued thereon and were levied on the merchandise of said Lesem; that after the said levy the said Lesem, on the petition of Claflin, Allen & Co., was declared a bankrupt, and that the United States marshal, under a warrant issued from the district court sitting in bankruptcy, took the merchandise levied on, and delivered the same to assignee Arnold, defendant in this cause, who disposed of the same as part of the estate of Lesem—concluding with a prayer for payment of said judgment.

The answer denies that there was a good and valid levy or existing lien by virtue thereof at the time the marshal took possession of the goods as the property of Lesem; and affirms that if there had been such levy and lien, the same was abandoned and lost by the delivery of the property by the sheriff to Lesem; that the property belonged of right to the assignee, and that plaintiffs have no right to demand payment as asked for by them.

STATEMENT OF FACTS.

The bankrupt, Marks Lesem, was doing a mercantile business in the spring of the year eighteen hundred and sixty-eight, in Miller county, Missouri; was sued by plaintiffs in the circuit court of said county, and judgments, amounting to three thousand dollars, were obtained at the March term, eighteen hundred and sixty-eight; executions issued thereon,

and were levied on the goods, wares and merchandise of said Lesem to the value of ten thousand dollars and upwards. The sheriff's return on execution shows that he executed the writ "by levying the same upon and seizing all the right, title, claim and interest of defendant in and to all his personal property, consisting of goods, wares, merchandise and machinery; done in said county this first day of April, eighteen hundred and sixty-eight; and I further certify that prior to the day of selling said property, to wit: On the eighth day of April, eighteen hundred and sixty-eight, the said defendant as principal, and J. M. Goodrich and Thomas Thompson as securities, executed to me a delivery bond in the penal sum of six thousand eight hundred and thirty-eight dollars and forty-two cents, conditioned that said property would be delivered to me on or before the day of sale. And I further certify that before sale the United States marshal for the western district of Missouri notified me not to sell said property as the same was of right the property of the assignee of said defendant. I hereby return said execution not satisfied, together with said delivery bond, this sixth day of October, eighteen hundred and sixty-eight."

On the sixteenth day of April, eighteen hundred and sixty-eight, a creditor's petition was filed by Claflin, Allen & Co., on which petition Lesem was, on the twenty-fifth day of the same month, declared a bankrupt. Under the warrant issued in bankruptcy the marshal took the goods levied upon by the sheriff and delivered under the bond to Lesem, as the property of Lesem, and the same have been sold by the assignee. The question is shall the court order the assignee to pay from the proceeds arising from the sale of said goods the amount of the executions and costs.

KREKEL, J.—The answer must be in the affirmative unless it shall appear that there was no such levy on the property of Lesem by the sheriff as would create a lien. The statutes of Missouri direct that the word "levy" be construed to mean "the actual seizure of the property by the officer charged

with the execution of the writ;" and further provide that "no execution prior to the levy thereof shall be a lien on any goods, chattels, or other personal property." The return of the sheriff is that on the first day of April, eighteen hundred and sixty-eight, he executed the writ "by levying the same upon and seizing all the right, title, claim and interest of defendant in and to all his personal property, consisting of goods, wares, merchandise and machinery." To this return it is objected that there is no such description of property as constitutes a valid levy and lien. Giving the language used in the return its legal import, the conclusion must be that the sheriff took actual possession of the goods, wares, merchandise and machinery. This would enable the sheriff or any one interested to identify the property levied on—the object had in view by the enactment. Questions of identity under levies, mainly arise between claimants to the same property in cases of implied liens or possession, and the cases cited at bar are nearly all of that class. There is no doubt that creditors, other than the plaintiffs in these executions, could by proper steps, have compelled the sheriff to make a full description in his return of the goods levied on, that they might be enabled to prosecute and take care of their own interests, but such steps were not taken, nor if taken, would they be of avail. The possession of the property sufficiently identified it for any purpose, and the levy must be held good against the objections made.

It is strongly urged upon the consideration of the court that the delivery of goods by the sheriff under the bond, destroys the levy and makes void any lien that may have existed, and that the possession of, and title to, the property by such delivery, restored to Lesem all the rights which he had prior to the levy. Whatever of difficulty might have occurred in the absence of statutory provisions, the latter seem to solve. The law which authorizes the taking of a bond by the sheriff from the person who desires to retain possession of property levied on, provides that, "if the property is not delivered in conformity to the bond, the levy

shall remain a lien upon the property taken for the satisfaction of the judgment into whose possession soever the property may pass." It is not necessary to discuss the difficulties which might arise in the construction of the latter part of this provision in a case where the property, in the ordinary course of trade, had passed out of the possession of the defendant in the execution, and was held by an innocent purchaser, for no such question is presented. The property in controversy was found in the possession of Lesem, taken by the United States marshal under a warrant in bankruptcy, and delivered to the assignee. To hold that by taking the delivery bond the levy and lien had been abandoned or lost, would require such a construction of the provision cited as to declare that from the time of taking the bond and up to non-delivery in conformity to its conditions, no lien existed—a construction which the court is not willing to give. Whatever construction the phraseology may admit of, the intention of the law evidently is to continue the lien. It is urged that if a lien existed by force of State law, the marshal, in taking possession of the goods, committed a trespass. No question as to the act of the United States marshal has arisen, for the sheriff seems to have yielded his better right by prior levy, adopting, perhaps, the view of the court, or the one urged by the general creditor, that the delivery bond secured him and the plaintiffs in the executions. This, under ordinary circumstances, would undoubtedly be the case, but here the law had wrested from the defendant in the executions the property which he and his securities had obligated themselves to deliver. If they were liable on their delivery bond they certainly would have had a valid claim against the creditors of the bankrupt to the extent of the value of the goods taken or the amount of their liability on the bond. The property in this case amounted in value to more than double the amount of the judgments. The creditors who realized the benefit of the whole property must not be injured by the disposition to be made of the case. There being no dispute as to judgments under which execution issued and

levy was made, the court holds that the execution creditors are entitled to satisfaction out of the proceeds of the goods levied on by the sheriff and afterwards seized by the United States marshal under a warrant in bankruptcy, and orders accordingly.

LAY & BELCH and EWING & SMITH for Swope, Levy & Co. *et al.*

E. L. EDWARDS for L. L. Arnold, assignee.

UNITED STATES DISTRICT COURT—E. D. WISCONSIN.

An assignee in bankruptcy of one of two joint makers of a note secured by a mortgage, cannot maintain a petition to declare the security void for usury.

The bankrupt act does not grant to the assignee of a bankrupt any right or power to institute proceedings for the recovery of a statute forfeited and claimed by the bankrupt either prior or subsequent to proceedings against him in bankruptcy.

An assignee, through the court, may require the creditor to prove his debt in the usual form, reciting the security and setting forth the consideration, and may contest the claim for any usurious surplus.

BROMBEY, Assignee, v. *SMITH et al.*

MILLER, J.—Ellwood Lay having been adjudicated a bankrupt on the petition of his creditors, Van Buren Brombey, the assignee, presented his petition to the court, praying an order of sale of certain real estate of the bankrupt. The petition also set forth a mortgage of said real estate given by Ellwood Lay and David M. Lay to Dominicus Jordan, to secure their note for five thousand dollars, with a prayer that the same be declared by the court to be void for the usury therein stated. The facts stated present a case of usury, and if established by proof, would render the mortgage void under the law of this state in force at the date of the mortgage. The mortgagee having died some time after the date of the mortgage, this proceeding is instituted against his executors.

To prove the usury stated in the petition, depositions of

the mortgagors were offered to be read. The reading of these depositions was objected to on the ground that by the death of the mortgagee these persons were not competent witnesses.

It is enacted by Congress (2 Brightly's Digest, 204), that in the courts of the United States there shall be no exclusion of any witness in civil actions because he is a party to or interested in the issue tried. But in actions by or against executors, administrators or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator, or intestate or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.

Ellwood Lay and David M. Lay are parties to the contract with Dominicus Jordan. This proceeding in the name of the assignee is virtually an action in relief of the mortgagors, and in which judgment may be rendered for or against the executors of the mortgagees. They propose to testify as to the transactions with the deceased and of the statements made by him in relation to the alleged usury. If these persons were permitted to give evidence to established the alleged usury, a decree rendered on their evidence alluding to the prayer of the petition, would be claimed a discharge of the debt as to David M. Lay, and might relieve Ellwood Lay of his bankruptcy. These mortgagors are in this aspect of their relation to this proceeding virtually parties. I think they come within the intent and scope of the acts of Congress, and that their depositions should be excluded. This provision of the act is for the protection of the estates of parties unable from death or infancy to testify, and it should be liberally construed.

The statute law of this state in force at the date of the note and mortgage, and under which this petition is brought, favors suits or actions brought or defended by borrowees for violation of its provisions against usury. It is alleged in the answer of defendants that the assignee in bankruptcy of the

mortgagor is not a borrower entitled to institute proceedings for a forfeiture of the debt. It is also pleaded that the assignee is not the borrower, and cannot institute proceedings for a forfeiture without first paying or tendering the amount borrowed. The assignee in bankruptcy becomes vested with all the estate of the bankrupt not exempt, and must be considered in the light of a purchasee. *In re* Griffith, 3 N. B. R. 179; *Potter* v. *Cogswell*, 4 N. B. R. 19. The title to the mortgaged premises is vested in the assignee subject to the mortgage. If the assignee is not the borrower in the sense of the law, but a purchaser, and if competent to institute proceedings for a decree of forfeiture of the mortgaged premises for usury, or for relief from the usurious contract, he should first do equity by paying or tendering the money borrowed. The power to institute proceedings for a forfeiture under the law against usury, or for a relief from a usurious contract, without first paying or tendering the money borrowed, is a privilege conferred by the act upon the borrower alone.

I do not see, in the bankrupt act, a grant to the assignee of a bankrupt any right or power to institute proceedings for the recovery of a statute forfeited, and claimed by the bankrupt either prior or subsequent to proceedings against him in bankruptcy. Neither the bankrupt nor his mortgagor are parties on the record. Notwithstanding the proceedings in bankruptcy of Ellwood Lay, David M. Lay might have brought a bill or suit in his own name and in that of the bankrupt, or his assignee, or both, for relief under the law against usury. I do not think the assignee can sustain this position.

The assignee, through the court, may require the creditor to prove his debt in the usual form, reciting the security and setting forth the consideration, and if a larger amount is claimed than was actually borrowed, with lawful interest, he may contest the claim for the usurious surplus. Or, if a mortgage should be a device either to defend creditors or to give a prohibited preference to a creditor, the assignee may

proceed under the bankrupt act on behalf of the general creditors of the bankrupt.

The petition is dismissed.

A. FINCH for petitioner.

H. L. PALMER for defendants.

UNITED STATES DISTRICT COURT—MINNESOTA.

When the assets of a bankrupt, after the payment of valid liens, do not equal fifty per cent. of the claims proved against him contracted subsequently to January first, eighteen hundred and sixty-nine, on which he was liable as principal debtor, and he fails or neglects to file the consent of a majority in number and amount of those creditors, he can only be discharged from debts contracted prior to January first, eighteen hundred and sixty-nine.

In re W. H. GRAHAM.

NELSON, J.—The report of the register upon the application of the bankrupt for a discharge, shows that the assets received by the assignee amounted to the sum of nine hundred and eighty-eight dollars and ninety-six cents. This sum was received from the sale of property encumbered by liens, prior to January first, eighteen hundred and sixty-nine, to nearly the full amount realized. The assignee sold the property by order of the court freed from the encumbrances, the liens being transferred to the fund in court realized upon the sale. The surplus, after discharging the liens, does not equal fifty per cent. in value of the proved debts contracted subsequent to January first, eighteen hundred and sixty-nine, on which the bankrupt was liable as principal debtor.

The question presented is, whether a full discharge can be granted to the bankrupt from all debts contracted as above stated after January first, eighteen hundred and sixty-nine.

Section thirty-three, as amended July twenty-seven, eighteen hundred and sixty-eight, declares that "in all proceedings in bankruptcy commenced after the first of January, eighteen hundred and sixty-nine, no discharge shall be

granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, unless the assent in writing of a majority in number and value of the creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge."

I had occasion to pass upon this clause of section thirty-three, as amended, and held that a fair construction of it would require that, before a discharge could be granted, the proceeds of the debtor's property in the hands of the assignee, and subject to be divided among his creditors, must be equal to fifty per centum of the proved debts, upon which he was liable as principal debtor, unless an assent of his creditors was filed in accordance with the terms of the section. *In re* Frederick, 3 N. B. R. 117.

It is conceded in the case now under consideration, that the amount realized by the assignee upon the sale of the encumbered property was equal to fifty per cent. of all the debts against the bankrupt, secured and unsecured, and a discharge would be granted had not the law been changed by the act of July fourteenth, eighteen hundred and seventy, viz.: "That the provisions of the second clause of the thirty-third section of said act, as amended by the first section of an act in amendment thereof, approved July twenty-seven, eighteen hundred and sixty-eight, shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine." That is, the restriction still remains upon the bankrupt in regard to debts contracted since January first, eighteen hundred and sixty-nine, and the proceeds of the debtor's property applicable to the payment of *those* debts, must equal fifty per cent. in value, etc., before he can obtain a discharge from them.

The amount of the debts proved upon which this restriction operates are more than fifty per cent. of the moneys in

the hands of the assignee, after paying the liens, within the saving clauses of sections fourteen and twenty, and the bankrupt is therefore unable to meet the requirements of the act.

Inasmuch as he has also failed to file any assent of creditors, which would relieve him from this restriction, a discharge only from debts contracted prior to January first, eighteen hundred and sixty-nine, can be granted.

An order will be entered for such a modified discharge.

SUPREME COURT—CALIFORNIA.

When a complaint is defective in form, but not in substance, such defect can only be reached by demurrer, on the ground that the complaint is unintelligible or uncertain.

The filing in the Appellate Court of an adjudication of the bankruptcy of the defendant, rendered by the register of the United States District Court, after the appeal is taken, will not have the effect to stay the proceedings on the appeal.

A judgment of the court below, from which an appeal is pending, is a final judgment, in contemplation of section twenty-one of the United States Bankrupt Act.

MERRITT v. *GLIDDEN, et al.*

This is an action for freight on a cargo of lumber, shipped by plaintiff for defendants, at Port Orchard, Washington Territory, and duly delivered in San Francisco by plaintiff, under a charter party of affreightment, executed by the parties at Port Orchard, prior to the loading of the vessel.

The complaint sets out as the cause of action that, "by a certain charter party of affreightment," etc., between plaintiff, master of the bark *Vidette*, and the defendants, it was witnessed that the plaintiff agreed to charter the bark *Vidette* to the defendants, to take on board a cargo of lumber at Port Orchard, for San Francisco, in California, in consideration whereof the defendants agreed to furnish a full cargo of lumber to said bark, and to receive the said cargo in San Francisco, as fast as delivered, and to pay a freight of nine dollars, in United States gold coin, per thousand feet, to

plaintiff or his agent, for every thousand feet taken on board at Port Orchard.

After averring the receipt of the lumber on board the bark, and its delivery in San Francisco in accordance with the terms of the alleged charter party, plaintiff then alleges due performance by him, of all the conditions and agreements of said charter party by him to be performed and fulfilled, "and that the sum of money to be paid to plaintiff," etc., amounted to the sum of five thousand five hundred and sixteen dollars and ninety-five cents, of which defendants had notice, etc.; and that, although often requested, defendants had not paid, nor has either of them paid the said sum, or any part thereof, to plaintiff, except the sum of one thousand and four dollars and sixty-nine cents, paid in lumber. Plaintiff therefore prays judgment for the sum of four thousand five hundred and twelve dollars and twenty-six cents, in gold coin of the United States. On the trial, the plaintiff proved the execution of the charter party referred to in the complaint, the delivery of the cargo in San Francisco and its receipt by the defendants.

After the close of the plaintiff's testimony, the defendants moved for a nonsuit, on the following grounds:

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. Because it is nowhere alleged in the complaint that any contract was ever made or executed between the parties.

3d. Because it is nowhere alleged in the complaint, that any contract was ever delivered between the parties.

4th. Because it is nowhere alleged in the complaint, that the cargo of lumber mentioned therein was ever transferred from Port Orchard to San Francisco, or elsewhere, or at all, under the contract offered in evidence or any other.

5th. Because it is nowhere alleged in the complaint that defendants ever agreed to pay plaintiff anything for transporting said cargo of lumber, nor is it alleged, nor does it appear, what the service is worth if anything.

SECOND. Because it is not proven that any contract was

ever made, executed or delivered between the parties, or any of them.

THIRD. Because it was not proven that the cargo of lumber, in the complaints mentioned, was ever transported from Port Orchard to San Francisco under the contract.

FOURTH. Because it was not proven what was the value of the transportation of said cargo from said Port Orchard to San Francisco.

The motion for nonsuit was overruled.

Defendants then introduced in evidence a bill of lading signed by the plaintiff for the cargo of lumber shipped at Port Orchard, to be delivered in San Francisco, reserving freight at the rate of nine dollars per thousand feet, but not specifying that the freight was payable in gold coin. The court rendered judgment for the plaintiff, for the amount claimed in the complaint. Defendants moved for a new trial, which motion was overruled, and defendants appealed. The other facts are stated in the opinion.

BISHOP & GERALD for appellants:

FIRST. The allegation of the complaint is, that "by a certain charter party of affreightment, *then and there made*, * * * it was witnessed"———. It does not say that any contract ever was made. The fact is simply recited—nothing more—and is nowhere directly alleged. The case of *St. Clair Denver* v. *Burton*, 28 Cal. 550, is directly in point. In *Stringer* v. *Davis*, 30 Cal. 320, the supreme court affirmed the doctrine laid down in *Denver* v. *Burton*, *supra*.

There is no allegation in the complaint that the contract was delivered; nor is there any of proof that it ever was delivered. This is a fact material to plaintiff's case, as much so as the fact of the execution of the contract. *Barron* v. *Frink*, 30 Cal. 480; *Bartlett* v. *Crozier*, 17 John. 457; *Russel* v. *Byron & Ford*, 2 Cal. 86; *Gregory & Ford*, 14 id. 142; *Himmelman* v. *Danos*, 35 id. 441.

SECOND. Even if the charter party were properly alleged

and proven, the bill of lading, which does not call for gold coin, supersedes it.

The bill of lading was made by the plaintiff, himself, subsequent to the execution of the charter party at Port Orchard, and delivered to the defendants before sailing. On the arrival of the vessel here, it was presented to plaintiff by the defendant, Glidden, and he received the cargo under it.

The words "final judgment," as used in the bankrupt law, mean a final and complete adjudication of the subject matter of the action—a judgment which cannot be appealed from. The judgment of the district court, though final in reference to the court in which it was rendered, was not final in reference to the subject matter of the controversy. A "final judgment" may be a judgment final in the court which renders it, or it may be final as to the subject matter of the controversy. The latter is the broader definition, and includes the former. *United States* v. *Schooner Peggy*, 1 Crouch 37; *Snell* v. *The Bridgewater C. G. Manufacturing Co.* 24 Pick. 296; *Hills* v. *Sherwood*, 33 Cal. 478.

BARSTOW & GARBER, for respondents:

FIRST. The complaint is good, according to the well established rules of common law pleading. *Smith* v. *Scott*, 95 E. C. L. 771: *Wilcox* v. *Haswell*, E. C. L. 72; *King* v. *Sutton* 1 Wm. Saunders, 274; *Spear* v. *Bicknell*, 5 Mass. 125; *Brymer* v. *The Thomas, etc.*, 2 Exchequer, 584. See, also, 2 Chitty on Pleading, marginal page, 221, for the form after which the complaint was framed.

The old forms of pleading have always been held sufficient by this court. *Wilkins* v. *Stidger*, 22 Cal. 235; *Abadie* v. *Carillo*, 32 id. 172; *Freeborn* v. *Elozer*, 10 id. 337.

In debt on a charter party, it was held good pleading to say, by a certain charter party it was witnessed "*testatum existit.*" *Jones* v. *Weaver*, Dyer, 118; *Bullivant* v. *Holman*,—James, 637; Stephens on Pleading, Rule V. p. 389.

"In declarations, whether in debt or covenant, it is suffi-

cient to say 'it is witnessed,' for it is only inducement to the action, contra in pleas or avowries; but even then it is good on general demurrer." *King* v. *Sutton*, *supra*.

The objection was waived by failing to demur to the complaint. The defect, if any, is one of form, not of substance. "A defectiveness of such pleading is not in the matter pleaded, but in the manner of pleading it; and it is therefore only a fault in form." Gould's Pleadings, chap. 3 sec. 30.

In a declaration, a material allegation by way of recital, is amendable, and is ill only on a special demurrer. 2 Salk. 636; 1 Chitty's Pleadings, 375; 1 Wils. 99; 2 Mass. 358; 7 Johns. 109.

The defect being not in the matter alleged, but in the manner of alleging it. Gould, chap. 3, sec. 33.

So, under our practice act, this is not an objection that the complaint does not state facts sufficient, etc., but that it does not state them in proper form. *Wilkins* v. *Stidger*, 22 Cal. 235; *Spear* v. *Bicknell*, 5 Mass. 125.

The objection that the facts are stated by way of recital, can only be taken by special demurrer. *Ring* v. *Roxborough*, 2 C. & J. 420; *Spencer* v. *Southwick*, 9 Johns. 316; *St. Johns* v. *Northrop*, 23 Barb. 30; *Castro's Exr.* v. *Armesti*, 14 Cal. 38; *Mills* v. *Gleason*, 21 id. 279; *Garcia* v. *Satrustegui*, 4 id. 244.

Whatever is good pleading at common law, is good here. *Abadie* v. *Carillo*, 32 Cal. 175, and cases cited.

Another objection urged against the complaint is, that it fails to show that the charter party was ever delivered. An allegation of delivery of such an instrument, is unnecessary. *Russell* v. *Whipple*, 2 Cowen, 536.

Where several instruments relate to the same transaction, the proper mode of construction is to take them together. *Carman* v. *Fowler*, 24 E. L. & E. 328; *Stacy* v. *Randall*, 17 Ill. 426. There is no discrepancy between the charter party and the bill of lading; one mentions nine dollars in gold, and the other simply nine dollars. In that respect the two are exactly alike in contemplation of law. *Reese* v. *Stearns*, 29 Cal. 273.

But the bill of lading is not signed by the defendants; so

that if it did provide that payment should be made in gold, it would not be binding on them.

SECOND. That term "final judgment," as used in this section, is the judgment from which this appeal is taken. The action had been prosecuted to final judgment long before proceedings in bankruptcy had been instituted. The appellants have procured a stay of proceedings on it by taking this appeal; but their act does not render it any the less final, nor will it be any more a final judgment, if affirmed by this court. If it were not a final judgment, no appeal would lie from it. *Loring* v. *Illsley*, 1 Cal. 24; *Belt* v. *Davis*, 1 Cal. 134; 33 Cal. 474; 24 Cal. 334; 34 Cal. 167; 28 Cal. 416.

RHODES, C. J.—The complaint is sufficient. It accords substantially with the forms given in Chitty on Pleading, and, according to the authorities cited by the plaintiff, it would be regarded as sufficient at common law. Should it be considered defective, under the rules of the code, the defect is in matter of form and not of substance—not in the matter alleged, but in the manner in which it is alleged. Such defect can be reached only by demurrer, on the seventh ground mentioned in section forty—that the complaint is unintelligible or uncertain.

After the cause was submitted to this court, on briefs to be filed, the counsel for the defendants, who are the appellants, filed in this court an adjudication of the bankruptcy of the defendants, rendered by the register of the district court of the United States for the district of California, after the appeal was taken. The purpose is, to have the proceedings in this court stayed, until the question of the defendant's discharge shall be determined.

The bankrupt act (14 U. S. Statutes, p. 526, sec. 21), provides that "no creditor whose debt is provable under this act, shall be allowed to prosecute to final judgment, any suit at law, or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding, shall, upon the application

of the bankrupt, be stayed to await the determination of the court in bankruptcy, on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge."

No authorities are cited by counsel, which throw any light on the question, whether an adjudication of the bankruptcy of a party, against whom a judgment had been rendered, would have the effect to stay proceedings on an appeal, which had been taken by him from the judgment.

The judgment from which the appeal is taken is, in our opinion, final, in the sense of the statute. It was not, we think, the purpose of the statute to suspend the right of the plaintiff to maintain in the appellate court, the correctness and validity of a judgment, from which the bankrupt might choose to take an appeal, until the determination of the question of the discharge of the bankrupt. To give the statute that construction, would place it in the power of the bankrupt to delay, and thus defeat remedies to which the plaintiff was entitled, and that, too, in cases where the appeal would be dismissed on motion of the plaintiff.

Judgment affirmed.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where the debtor, when insolvent, suffered his property to be taken on legal process on behalf of creditors, with the intent to give them preference, and they had at the time reasonable cause to believe that he was insolvent and that the transaction was in fraud of the provisions of the bankrupt act, and the transaction took place within four months before the filing of the petition in bankruptcy, it was a fraud on the act for the debtor to give or for the creditor to accept of the preference with the intent to prefer.

The insolvency, the intent to prefer and the doing or suffering the thing which works the preference, are the elements on the part of the debtor. The elements on the part of the creditor are the receiving or being benefited by such thing, the having reasonable cause to believe the debtor insolvent, and the having reasonable cause to believe that a preference is intended. These six elements must co-exist, but nothing else is necessary to make the transaction void, if challenged by the assignee in bankruptcy in due time.

KOHLSAAT v. *HOGUET et al.*

BLATCHFORD, J.—This case comes directly within the decision of this court, in the case of *in re* Black & Secor, 1 N. B. R.

81. The debtor, when insolvent, suffered his property to be taken on legal process on behalf of the defendants as creditors of his, with the intent to give them a preference, and the defendants had at the time reasonable cause to believe that he was insolvent, and that the transaction was in fraud of the provisions of the bankruptcy act, and the transaction took place within four months before the filing of the petition in bankruptcy. It was a fraud on the act for the debtor to give and for the defendants to take the preference, with the intent on the part of the debtor that it should be a preference, the debtor being insolvent and the defendants having reasonable cause to believe so, and reasonable cause to believe that the debtor intended the preference.

The insolvency, the intent to give the preference, and the doing or suffering the thing which works the preference, are the elements on the part of the debtor. The elements on the part of the creditor are the receiving or being benefited by such thing, the having reasonable cause to believe the insolvency of the debtor and the having reasonable cause to believe that a preference is intended. These six elements must co-exist, but nothing else is necessary to make the transaction void, if challenged by the assignee in bankruptcy in due time.

In this case the defendants obtained the money which they realized through the legal process, intending to keep it at all events, and intending to keep it as a preference if it should be a preference, knowing that it must be a preference if the debtor should fail to induce the rest of his creditors to take a compromise of forty cents on the dollar.

The bill alleges sufficient facts to show that the debtor suffered his property to be taken within the meaning of the act.

There must be a decree for the plaintiff for the amount received by the defendants with costs.

G. A. Seixas for plaintiff.

A. Blumenstiel for defendant.

UNITED STATES DISTRICT COURT—RHODE ISLAND.

The decease of one partner prior to any adjudication upon the question of bankruptcy, is not legal cause for dismissing the petition.

A firm may be declared bankrupts, although one of its members may have already been adjudicated on a creditor's petition.

Where it is proved that the bankrupt has been imprisoned but seven days exclusive of the first day, this of itself is not sufficient to support an adjudication of bankruptcy.

For the purposes of petitioning, a partnership is to be held to subsist so long as there are outstanding debts against the firm or assets undistributed belonging to it.

If neither the petition nor the deposition of the act of bankruptcy are signed by the petitioner, the defect is fatal.

HUNT, TILLINGHAST & CO. v. *POOKE & STEERE.*

KNOWLES, J.—The petition in this case was filed on the fifteenth of September, eighteen hundred and seventy, and process thereon ordered returnable October fifth, eighteen hundred and seventy. The petitioners named are Seth B. Hunt, Philip Tillinghast and Robert W. Aborn, of the city of New York, who represent that they are creditors of William Pooke and Anthony Steere, late partners as Pooke & Steere; and that said Pooke & Steere have committed an act of bankruptcy, namely: have been actually imprisoned for more than seven days on a civil action for a sum exceeding one hundred dollars. The petition is subscribed, "Hunt, Tillinghast & Co., petitioners, by Philip Tillinghast, Jr., special attorney." The oath or verification of this petition, though written "I, Philip Tillinghast, Jr., special attorney of the petitioners above named," etc., is subscribed similarly to the petition, as also is the deposition to the act of bankruptcy, although the deposition is drawn as that of Philip Tillinghast, Jr., of the city of New York, testifying simply as a witness. The deposition as to the petitioning creditors' claim, filed with their petition, was by the said Philip Tillinghast, Jr., and subscribed as above stated.

On the fifth of October the respondents appeared by counsel, denying their bankruptcy, and waiving their right to a jury trial, whereupon the case was continued for hearing at a day future. On the fourteenth of October, one of the

respondents, Steere, deceased, and on the suggestion of his death the case was further continued, to await an appointment of an administrator. On the appointment of Thomas E. Steere to that office, he was active to appear and assume the defence of the suit; and accordingly on the first of March, eighteen hundred and seventy-one, he entered an appearance and filed his motion in writing, that the said suit be abated and dismissed, because of the death of the said Anthony Steere. Neither party being prepared for a hearing on that day, the case was continued without special assignment until the seventh of June, when, by agreement, it was called for hearing before the court.

As the counsel for the petitioners was proceeding to state the case, as one of simply a denial of the act of bankruptcy, the court reminded the parties that a motion to dismiss upon some ground unknown to the court had been filed, and if that was not waived, to that must attention first be given. A conference between counsel then ensued, in the course of which it appeared that the respondents proposed raising many points of defence, other than that specified in their written motion, they contending, among other grounds, that there was "no case here—nothing to try." The result of the conference, as understood by the court was, that the respondents withdrew their specific motion to dismiss the petition, agreeing that under the general issue (so to speak), all imaginable defences were to be open to the respondents.

In accordance with the arrangement, the opening on the part of the petitioners was but brief. Assuming and averring that the petition and all the accompanying papers were in due form, so far as they knew or had reason to believe, they maintained that a bare recital of the facts, as agreed upon by the parties, was alone necessary to show that a decree of bankruptcy should be entered against the respondents. What could be, or was to be submitted in opposition to this view, they had not as yet been apprised, and should not presume to anticipate. Concerning the facts—actual occurrences—the parties were not at variance, thus:

The respondents, Pooke & Steere, once copartners, were on the forenoon of the eighth day of September, eighteen hundred and seventy, committed to the Providence County jail, as joint debtors, upon an execution issuing from the United States circuit court, for the sum of one hundred and eighty-seven thousand dollars and upwards, in favor of Hunt, Tillinghast & Company. That said Pooke, on the same day, gave bond as a prisoner for the jail limits, and to remain a true prisoner, and left the jail building; while said Steere, not giving such bond, remained in the jail building as a prisoner, until between ten and twelve o'clock A. M., September fifteenth, when said both Pooke and himself were discharged from their commitments, upon certificates from the proper officers that they had severally and respectively taken the Poor Debtor's oath, pursuant to the laws of Rhode Island and of the United States.

In view of these facts, it being also conceded that the petition in bankruptcy was filed before (by an hour or two), the taking of the oath by the respondents, the petitioners contended that the act of bankruptcy charged, (actual imprisonment for more than seven days), was fully proven, and there rested their case.

On behalf of the defence, several points were presented. One of them being, that the decease of Anthony Steere prior to any adjudication upon the question of bankruptcy, was legal cause for a dismissal of the petition as against both Steere and Pooke; and in regard to it, it seems sufficient to say, I must overrule it as untenable, in view of the provisions of the twelfth section of the bankrupt law.

A second point was, that the said Pooke had already been, as long ago as May twenty-sixth, eighteen hundred and sixty-nine, declared a bankrupt on a creditor's petition; to which it seems a sufficient answer, that the proceeding of eighteen hundred and sixty-nine, was against said Pooke as an individual, without reference or allusion to any co-partnership then or theretofore existing between him and the said Steere, or any other person, while

the pending petition is against him and Steere, as "late partners as Pooke & Steere," constituting a co-partnership or firm. An individual, it is obvious, may be hoplessly insolvent, while the firm of which he is a member is beyond question able to pay all its liabilities on demand, and *vice versa*.

The third point of defence was one of greater nicety, as it involved the question stated in brief, whether an imprisonment commencing on the forenoon of the eighth of September, eighteen hundred and seventy, and terminating before noon on the fifteenth of that month, was actual imprisonment for more than seven days within the meaning of the thirty-ninth section of the bankrupt act?

The only act of bankruptcy charged, as above stated, was such imprisonment; and this, it was contended on behalf of the respondents, was not shown by the agreed facts. That the parties were imprisoned on the eighth of September and on the seven succeeding days was conceded, and this, argued the petitioners, was an imprisonment of more than seven days. On the contrary, argued the respondents, firstly, the statute prescribes expressly, that in computing periods of days, the first day is to be excluded; and secondly, under certain circumstances, days are to be decreed to be consecutive periods of twenty-four hours, irrespective of sunrisings or sunsets; and in this case the parties were in prison but seven of such periods at the most. And as bearing upon the second point the court's attention was directed by the respondents to many authorities. The pertinence and cogency of these, it seems not necessary to consider here, inasmuch as I am constrained to hold that the proper rule of computation is found in the forty-eighth section of the statute, thus expressed: "In all cases in which any particular number of days is prescribed by the act, for the doing of any act, or *for any other purpose*, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day." Adopting this as the rule of computation, it is manifest that the respondents were

not imprisoned more than seven days, and that the act of bankruptcy charged is not proven. The defendants were in prison, that is, in close jail, or upon the jail limits under bond, "actually imprisoned," in legal contemplation as I hold, six entire days and portions of two other days (the first and eighth), seven days only—if the first day be excluded in conformity with the statute rule as above quoted—not eight days as contended by the petitioners. Upon this point, my judgment must be in favor of the respondents. The business men of the community are required to keep in view the provisions of the bankrupt law, and those provisions, it is to be assumed, are framed and phrased with reference to the needs and capacity of that class. When, therefore, the law expressly says, as in the passage quoted, that when a particular number of days is named "for any purpose," the same shall be reckoned, "exclusive of the first day." The real question, in my judgment is, how would this be understood by readers in general? The obvious meaning, should, I think, be adopted as the legal meaning, at least until some sufficient reason be assigned for a ruling to the contrary. For such a reason I have sought, as yet without success.

Another point of defence was, that inasmuch as the said Pooke was adjudged a bankrupt in August, eighteen hundred and sixty-nine, the co-partnership between him and said Steere was then and thereby dissolved, and therefore they not being copartners at the date of the filing of the petition in this case, being in fact styled therein as "late partners," the petition would be dismissed.

This point, it must be granted, appears to be well taken, so long as we consider only the letter of the law. In view, however, of the exposition of the statute in this particular, to which my attention has been directed, especially that of Judge Lowell, *in re* Williams, 3 N. B. R. 74, I hold the better law to be, that for the purposes of petitioning, a partnership is to be held to subsist, so long as there are outstanding debts against a firm, *or* assets undistributed belonging to the firm. By judge Blatchford, *in re* Hartough, 3 N. B. R. 107, and in

other cases, I am aware it has been held that only when there is in existence joint property undistributed, as well as outstanding liabilities, can a petition against a dissolved copartnership be maintained. Still, in view of the reasonings of the learned judge first named, I must concur with him, and overrule this point of the defence. That there are outstanding debts against the firm of Pooke & Steere is in proof, and whether or not there are assets undistributed, neither party at the hearing deemed it material to inquire.

Yet another point of defence was raised by the defendant, and that of more interest and importance than either of those hereinbefore considered. This was, that inasmuch as neither the petition nor the deposition of the act of bankruptcy was signed or sworn to by any one of the petitioners, but by a third person, assuming to be a "special attorney," the petition cannot be entertained; and in support of this objection the language of the act, and the forms of petitions, oaths and depositions prescribed by the supreme court, and the established usage in this district, are cited and referred to. This objection I must regard as well-founded—nay, insuperable. The reply to it on the part of the complainant, is not equal to the exigency.

It is said this point has been settled by adjudication against the defendant in other districts, whereas, so far as I can learn, the point presented has never before been raised. The district court of Maryland, *in re* Moore & Brother *v.* Harley, 4 N. B. R. 71, held that an omission on the part of the petitioner to subscribe the affidavit to a creditor's petition, the petition itself being regularly subscribed and sworn to, was a fatal defect, "inasmuch as the forms prescribed by the supreme court required that the affidavit, as well as the petition, should be subscribed by the petitioners; the court holding, also, that the defect was incurable, since the petition was not a petition in *propria forma*, such as could be amended." This case, which is, I repeat, the only one brought to my notice as bearing on the point in question, supports, rather than antagonizes with, the objection under consideration.

It is said, again, that the bankrupt act does not, by its terms, require that the petition be verified by the oath of the petitioner, or be subscribed by the petitioner himself. This is true; but it also is true that the supreme court deemed it wise, in the exercise of the powers conferred upon them, to prescribe forms of proceedings to which parties are bound to conform as scrupulously as to the provisions of the act itself. That the petition, oaths and affidavits in this case are in conformity with those forms, is not pretended.

And yet again it is said that the defect complained of should have been brought to the notice of the court and the petitioners at an earlier day, by a plea in abatement as it were, and that the omission or neglect of the defendants to do this, is, in legal effect, a waiver of all objection to irregularities of the kind under consideration. In this view of the learned counsel I am unable to concur, because, to say nothing of other satisfactory reasons, I understood that under the agreement of the parties made in the presence of the court on the day of hearing, the defendants were at liberty to assume whatever ground of defence they should deem fitting. It is true, no formal motion to dismiss the petition for substantial, incurable defects apparent on the record, was made by the respondents, but I cannot but hold that such a motion would have been in order on the moving of the hearing, entitled to immediate consideration, whatever the state of the pleadings, and of course cannot but hold that the objection is reasonably urged.

It results, therefore, that for reason of incurable defects or irregularity in the petition and its accompanying affidavit, as well as for insufficient proof of the act of bankruptcy charged, the petition must be dismissed.

Messrs. TOBEY, PAYNE & JENCKES, for petitioners.

B. N. & S. S. LAPHAM, for respondents.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

A husband may make a settlement of property on his wife, when he is solvent, and pecuniarily in a condition to make such a gift, if it is not unreasonable in amount, and if after making it he still has abundant assets to pay those debts which he owed at that time.

SEDGWICK, Assignee, v. *PLACE et al.**

BLATCHFORD, J.—The re-argument of this case, as respects the Fifth avenue property and the furniture therein, and the proceeds thereof, has only served to confirm the conclusion at which I arrived on the first argument—that the plaintiff is not entitled to a decree as prayed for, as respects such property, furniture and proceeds.

The plaintiff claims that the settlement made by James K. Place on his wife, on the Fifth avenue property, should be set aside as fraudulent and void, because made with an intent to hinder, delay and defraud the creditors of James K. Place. The settlement was a voluntary one, made in consideration only of the marriage relation. The plaintiff, as assignee in bankruptcy of James K. Place, is vested by virtue of the fourteenth section of the bankruptcy act, with all the property conveyed by the bankrupt in fraud of his creditors.

It was decided by the supreme court of the United States, in eighteen hundred and twenty-three, (*Sexton* v. *Wheaton*, 8 Wheaton, 229), that a voluntary settlement in favor of a wife cannot be impeached by subsequent creditors merely because it was voluntary.

In *Hinde's Lessee* v. *Longworth*, 11 Wheat., 199, in eighteen hundred and twenty-six, the doctrine was laid down, that the mere fact that a grantor who makes a deed to a child in consideration of affection, is in debt to a small amount, will not make such deed fraudulent as against creditors, if it be shown that the grantor was in prosperous circumstances and unembarrassed, that the gift to the child was a reasonable provision, according to his state and condition in life, and that

* See 1 N. B. R. 204; 3 N. B. R. 35, 78; 4 N. B. R. 178.

enough was left for the payment of the debts of the grantor. This doctrine was approved by the court of appeals of New York, in eighteen hundred and fifty-one, in *Carpenter* v. *Roe*, 10 New York, 227, and in eighteen hundred and sixty-two, in *Babcock* v. *Eckler*, 24 New York, 623. The case last cited also says, that subsequent indebtedness cannot be invoked to make that fraudulent which was honest and free from impeachment at the time.

In *Van Wyck* v. *Seward*, 6 Paige, 62, in eighteen hundred and thirty-six, Chancellor Woolworth said: "I presume it cannot be seriously urged, that where a parent makes an advancement to his child, honestly and fairly retaining in his own hands at the same time property sufficient to pay all his debts, such child will be bound to refund the advancement, for the benefit of creditors, if it afterwards happens that the parent, either by misfortune or fraud, does not actually pay all his debts which existed at the time of the advancement."

In *Bank of the United States* v. *Housman*, 6 Paige, 526, in eighteen hundred and thirty-seven, the same judge said, that it was the settled law of New York, that a voluntary conveyance was not *per se* fraudulent, even as against creditors to whom the grantor was indebted at the date of the deed.

In *Frazer* v. *Western*, 1 Barbour's Ch. R. 220, in eighteen hundred and forty-five, the same judge says: "The law sanctions a conveyance founded upon the consideration of blood or of marriage merely. The legal presumption, therefore, is, that such a conveyance is valid, and not a fraud upon the rights of any one."

In *Parish* v. *Murphree*, 13 Howard, 92, in eighteen hundred and fifty-one, the result of the cases in regard to the statute of thirteen Elizabeth, rendering void conveyances made with intent to delay, hinder or defraud creditors, is well summed up by the court, in these words: "The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a general application of the words of the statute, instead of its

intent. No provision can be drawn so as to define minutely the circumstances under which fraud may be committed. If an individual, being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments, and without reference to future responsibilities. But, between these extremes, numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which, if known to the public, would not affect his credit, is fraudulent, would be a perversion of the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which at the time subjected the creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past and future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And, if a settlement be made without any fraudulent intent, yet, if the amount thus conveyed impaired the means of the grantor, so as to hinder or delay his creditors, it is, as to them, null and void."

These were the generally accepted doctrines in regard to voluntary settlements, until the decision of Lord Chancellor Westbury, in eighteen hundred and sixty-four, in the case of *Spirett* v. *Willows*, 3 De Gex, *Jones & Smith*, 293, and 11 Jurist N. S. part 1. 70, In that case it is said: "The plaintiff sues as a creditor, to set aside a voluntary settlement, or deed of gift, made by the defendant, his debtor. The plaintiff's debt was contracted before the time of making the settlement. He has since recovered judgment at law, and the debtor has become bankrupt. The plaintiff complains, in the words of the statute of Elizabeth, that his judgment and execution are hindered, delayed and defrauded, by the conveyance of the

goods and chattels of his debtor, made by this voluntary settlement. The defence is, that, at the time of making the settlement, the debtor reserved and had property enough to pay the plaintiff and all his other creditors in full, and that the settlement, therefore, is not fraudulent, because the debtor remained solvent after he had made it. There is some inconsistency in the decided cases on the subject of conveyances in fraud of creditors, but I think the following conclusions are well founded: If the debt of the creditor by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. But, if a voluntary settlement or deed of gift be impeached by subsequent creditors, whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent to delay, hinder or defraud creditors, or that, after the settlement, the settlor had no sufficient means or reasonable expectations of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency, in which case the law infers that the settlement was made with intent to delay, hinder or defraud creditors, and is therefore fraudulent and void. It is obvious, that the fact of a voluntary settlor, retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered or defrauded. I am, therefore, of opinion that this settlement is void as against the plaintiff." This case of *Spirett* v. *Willows* came under consideration in *Freeman* v. *Pope*, Eng. L. R., Eq. cases, 206, in eighteen hundred and sixty-nine. In that case a subsequent creditor of the settlor's brought the suit, to set aside, as fraudulent and void under the statute of thirteenth Eliza-

beth, as against the creditors of the settlor, a settlement of a policy of life insurance, made by the settlor upon his god-daughter, in consideration of affection. Vice-chancellor James says: "Were this case absolutely free from authority, I should have thought that the question I had to put to myself under the statute, was, in the words of the statute, whether there was actually any intention, by this settlement, on the part of the settlor, to defeat, hinder or delay his creditors. If I were a special juryman, to whom such a question were put to me by the judge, I should, upon the facts of this case, come to the conclusion that this gentleman had no such intention whatever. I am satisfied that he had not any idea whatever of defrauding or cheating his creditors, by making that settlement, in favor of his god-daughter, of the policy of insurance." He then says, that he considers himself bound by the decision of Lord Westbury, in *Spirett* v. *Willows*, though he cannot follow the reasoning. He then quotes the material points of the judgment of Lord Westbury, as above cited, and comments upon them thus: "That is to say, it is immaterial whether the debtor had any intention whatever of defeating his creditors; but if, in the result, from some accident, a small debt remained unpaid for some years, and by reason of a voluntary settlement and subsequent insolvency of the debtor, the creditor was delayed in the payment of his debt, then, however honest the settlement was, however solvent the settlor was at the time, if, at the time, he had one hundred thousand pounds, and put one hundred pounds in the settlement, and a creditor for say ten pounds happened to be unpaid in consequence of the settlor losing his money in the interval, that would be quite sufficient to set aside the voluntary settlement. That is the decision of Lord Westbury. I am bound by that decision, and, therefore, although bound to express my extra-judicial opinion that this gentleman, having regard to his income and his means, had no intention whatever to cheat his creditors at that time, I must judicially declare this settlement to be fraudulent and void as against his creditors." This case of *Freeman* v. *Pope*, was

appealed and heard on appeal before Lord Chancellor Hatherley, and Lord Justice Giffard in eighteen hundred and seventy. (Eng. Law Rep. 5 Ch. App., 538.) The Lord Chancellor, in his judgment, after holding that, if the necessary effect of an instrument is to defeat, hinder, or delay creditors, that necessary effect must be considered as evidencing the intention to do so, whatever view may be taken as to what was actually passing in the mind of the maker of the instrument, says, that, in the case of *Spirett* v. *Willows*, there was direct and positive evidence of an intention to defraud, independently of the consequences which followed, or which might have been expected to follow from the act. He adds: "But it is established by the authorities, that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which substracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement, (supposing it effectual), that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

He then refers to what he speaks of as the *dictu* of Lord Westbury, in the case of *Spirett* v. *Willows*, and especially points out the following remark of Lord Westbury as a dictum: "If the debt of the creditor by whom the voluntary settlement is impeached, existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement."

In regard to this *dictum* he says: "This expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but it is

unnecessary to resort to it in the present case." He then holds, that the decree of Vice-chancellor James was right on the ground that, irrespective of the question whether there was an actual intention to delay creditors, the facts were such as to show that the necessary consequence of what was done was to delay them. In the same case, Lord Justice Giffard says, that the propositions laid down in *Spirett* v. *Willows*, taken as abstract propositions, go too far and beyond what the law is. In respect to voluntary settlements, he says, that an intent to defeat creditors may be inferred in a variety of ways. "For instance, if, after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if, at the date of the settlement, the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them."

It is, therefore, quite clear, that nothing in the case of *Spirett* v. *Willows* changes the settled view held in England and the United States prior to that case, as to the proper construction of the statute of thirteen Elizabeth.

The statute of New York (2 R. S. 137, sec. 1), declaring conveyances of and charges upon property made with the intent to hinder, delay or defraud creditors to be void, as against the persons so hindered, delayed or defrauded, is, in substance, the same, in its provisions, as the first section of the statute of thirteen Elizabeth, chapter five. The statute of New York also contains the provision (2 R. S. 137, sec. 4) that the question of such fraudulent intent shall, in all cases, be deemed a question of fact and not of law, and that no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration.

James K. Place, the settlor, was, for several years prior

to December first, eighteen hundred and sixty-five, in a prosperous business in the city of New York, as a member of the mercantile house of J. K. & E. B. Place, in which he and Ephraim B. Place were the only general partners, and James D. Sparkman was the sole special partner. The co-partnership had, by its terms, on the thirtieth day of November, eighteen hundred and sixty-five, some time yet to run. In the summer of eighteen hundred and sixty-five, James K. Place, being at the time prosperous in business and free from embarrassment, and abundantly solvent, determined to make a settlement on his wife of a house for a residence. In pursuance of that purpose, he purchased, for the sum of five thousand dollars, a groundrent lease of a lot of land on the northwesterly corner of Forty-seventh street and Fifth avenue, in the city of New York, in size, twenty-five feet by one hundred feet. He paid five hundred dollars of the purchase money on the thirteenth of July, eighteen hundred and sixty-five, and the remainder on the eighteenth of September, eighteen hundred and sixty-five. The holder of the lease assigned it to James K. Place, by an instrument dated June twenty-first, eighteen hundred and sixty-five, and recorded September nineteenth, eighteen hundred and sixty-five. He immediately commenced the erection of a house on the lot, making for the purpose, priorto the second of November, eighteen hundred and sixty-five,written contracts with various persons to do various parts of the work, and furnish the materials therefor; payments for the work and materials to be made by instalments, as the work progressed to defined points. The house was completed about September, eighteen hundred and sixty-six. The affixing of materials and of the results of labor to the premises, in the shape of the house, kept ahead of the payments made therefor, by James K. Place, the accretion to the land being at the rate of from seven to eight thousand dollars a month during the year from September, eighteen hundred and sixty-five to September, eighteen hundred and sixty-six.

On the thirtieth of November, eighteen hundred and

sixty-five, the firm of J. K. & E. B. Place was dissolved, by the mutual consent of its general and special partners. E. B. Place retired from business, and James K. Place and James D. Sparkman formed, as general partners, on the first of December, eighteen hundred and sixty-five, a co-partnership, under the firm name of J. K. Place & Co., for the purpose of continuing the business of J. K. & E. B. Place. The firm of J. K. & E. B. Place had been prosperous. At its dissolution, November thirtieth, eighteen hundred and sixty-five, its accounts were adjusted, after being stated, and the balance of the assets, after allowing for the payments of its debts, was divided among the members of the firm, by carrying to the credit of each member his proper share. Such share of James K. Place, was, on that day, two hundred and twenty-seven thousand three hundred and one dollars and sixty-two cents; and such share of James D. Sparkman was two hundred and sixty-two thousand seven hundred and nineteen dollars and forty-five cents. These sums, in the shape in which they were so credited, being in the shape of assets of J. K. & E. B. Place, were put by James K. Place and James D. Sparkman, as capital, into the new firm of J. K. Place & Co., and amounted to more than four hundred and ninety thousand dollars. J. K. Place & Co. took, as purchasers, the stock of goods which J. K. & E. B. Place had on hand, and continued the same description of business at the same store. J. K. Place & Co. collected the receivables of J. K. & E. B. Place, and, with the proceeds, liquidated the debts due by J. K. & E. B. Place. Such debts amounted to over three million eight hundred thousand dollars. All of them, except debts to the amount of some thirty to thirty-five thousand dollars, were paid within from sixty to ninety days after the thirtieth of November, eighteen hundred and sixty-five, J. K. Place and Co. having collected about ninety-eight per cent. of the debts due to J. K. & E. B. Place. There is no evidence that, at the time of forming the new firm of J. K. Place & Co., December first, eighteen hundred and sixty-five, James K. Place had any intention of

doing anything else in respect to his own future business or the business of such new firm, except to continue the prosperous business which the old firm of J. K. & E. B. Place enjoyed, or to embark in any hazardous enterprises or speculations; and there is no evidence to show that he had any reason to suppose that the new firm would not be as suc cessful as the old firm had proved itself to be.

On the eighteenth of April, eighteen hundred and sixty-six, two instruments of assignment of the lease so assigned to James K. Place, were acknowledged and recorded in the proper recording office. One was an assignment of such lease by James K. Place, to Alexander H. Wallis, and was dated November thirtieth, eighteen hundred and sixty-five. Mr. Wallis was the legal adviser of James K. Place. The other instrument was an assignment of such lease by Mr. Wallis to Susan A. Place, the wife of James K. Place, and was dated December first, eighteen hundred and sixty-five.

On the making, on the thirteenth of July, eighteen hundred and sixty-five, of the first payment, five hundred dollars, on account of the assignment of the lease, an account was opened, in a book kept by J. K. & E. B. Place, as a book of that firm, which account was headed: "Fifth avenue, corner Forty-seventh street, J. K. Place." This account was continued as the same account, under the same heading, in such book, so long as the firm of J. K. & E. B. Place continued, and, after that, the same book being kept by J. K. Place & Co., as a book of that firm, the account was continued as the same account, in the same book, under the same heading. To this account were debited all payments made on account of the purchase of the lease and building of the house. The first item debited in such account, was the five hundred dollars paid on account of the lease, July thirteenth, eighteen hundred and sixty-five, and it was entered as of that date. The amount of the items debited in such account to and including November thirtieth, eighteen hundred and sixty-five, were ten thousand and twenty-eight dollars and thirty-five cents; to and including December thirty-first, eighteen

hundred and sixty-five, eleven thousand seven hundred and seventy-four dollars and forty-four cents; to and including December thirty-first, eighteen hundred and sixty-six, sixty-one thousand six hundred and twenty-seven dollars; to and including April thirtieth, eighteen hundred and sixty-seven, eighty-two thousand five hundred and forty-seven dollars and eight cents; and to and including November twentieth, eighteen hundred and sixty-seven, ninety-five thousand five hundred and thirty-three dollars and four cents. The amount of items so debited during the year eighteen hundred and sixty-five, was eleven thousand seven hundred and forty-four dollars and forty-four cents; during the year eighteen hundred and sixty-six, forty-nine thousand eight hundred and fifty-two dollars and fifty-six cents; during the time in the year eighteen hundred and sixty-seven which preceded the first of May, eighteen hundred and sixty-seven, twenty thousand nine hundred and twenty dollars and eight cents; and during the time in the year eighteen hundred and sixty-seven, which succeeded the thirtieth of April, eighteen hundred and sixty-seven, and preceded the twenty-first of November, eighteen hundred and sixty-seven, twelve thousand nine hundred and eighty-five dollars and ninety-six cents. By the first of December, eighteen hundred and sixty-five, twenty-five thousand dollars had been expended on account of the property, although only ten thousand and twenty-eight dollars and thirty-five cents had been debited to the account.

In regard to the furniture in the Fifth Avenue house, some of it belonged to Mrs. Place, having been given to her by her father a number of years before eighteen hundred and sixty-six. The rest of it was procured during the year eighteen hundred and sixty-six, the order for the making of a large part of it having been given in June, eighteen hundred and sixty-six. It was paid for by Mr. Place, as a part of the settlement on his wife, having been ordered and purchased by Mrs. Place in her own name. After the completion of the house, and the procuring of the furniture, Mr. and Mrs.

Place moved into the house and occupied it with their family.

The business of the firm of J. K. Place & Co. was at first very profitable. During the year eighteen hundred and sixty-six, and after April or May in that year, it sustained some losses, but its losses were not ascertained until December thirty-first, eighteen hundred and sixty-six, when they amounted, up to that time, to about one hundred and seventy-five thousand dollars. By that time the labor and materials which went into the house had been all of them substantially put into it, as between the settlor and the settlee, and the furniture had been procured. The business of the firm went on, however, and it did not fail until November twentieth, eighteen hundred and sixty-seven, although by May, eighteen hundred and sixty-seven, there was reason to think it would become insolvent.

I cannot regard the investment in the house and lease and in the furniture, as an investment of the funds of the partnership for account of the partnership. The expenditures were in effect charged to James K. Place, with the assent of his partner, and the money was in effect drawn by him from the firm and applied to such expenditures as between him and his partner, and with such partner's assent. The transaction of the purchase of the lease and the building of the house was an open and not a secret one, and all the moneys applied to the purpose and to purchasing the furniture were debited on the books of the firm, in an account headed with the designation of the property and with the name of James K. Place. This was, to all intents and purposes, an individual account of Place's, kept in that shape for the sake of convenience. All of his private accounts, with few exceptions, were kept in the same way in the books of the firm.

Within the principles settled in the case before referred to, James K. Place was solvent and pecuniarily in a condition to make the settlement he made. It was not unreasonable in amount, and after he made it, he still had abundant property

left to pay the debts which he owed. Whether the assignment of the lease to Mrs. Place be regarded as having been made December first, eighteen hundred and sixty-five, or April eighteenth, eighteen hundred and sixty-six, is of no consequence. On all the evidence, whether either of those dates be taken as the date of the execution and delivery of the assignment to Mrs. Place, I see no evidence of any intent on the part of Mr. Place to defraud his then existing creditors, or to divest himself of his property and embark in a new and hazardous business and defraud subsequent creditors. The case is not at all like the cases of *Savage* v. *Murphy*, 34 N. Y. 508 and *Case* v. *Phelps*, 39 N. Y. 164, so strongly relied on by the plaintiff. In the former case, the court found that the settlor stripped himself of the title to all his property, by transfer to his wife and children, without any visible change of possession, and with the intent to contract and continue a future indebtedness in his business, on the credit of his apparent ownership of the property transferred. In *Case* v. *Phelps*, the deed of conveyance was not put on record, there was no apparent change of ownership, and the creditor trusted him in the belief that he still owned the premises.

The evidence in the present case is very voluminous. The discussions of the case have been thorough and exhaustive, both orally and on paper. I have bestowed upon its consideration much care and time. I consented to a re-argument of the case as respected the Fifth avenue property and the furniture, because of the large amount involved, of the importance of the principles and questions raised and debated, and of the apparent apprehension, on the part of the plaintiff's counsel, that he had not, at the first hearing, presented the case to the court in the light in which it ought to have been and might have been presented. I have considered fully all the views presented by the plaintiff's counsel in all his briefs, and, if I have confined what I have hereinbefore said to the salient and prominent features of the case, it is not because I have failed to

pass upon every view urged on the part of the plaintiff, but because there are certain controlling features, which, under the law, as I understand it, must govern the disposition of the case, and because a detailed discussion of every point of law and fact urged on the part of the plaintiff would swell this opinion to an undesirable length. The result I have arrived at is one which I am thoroughly satisfied is correct, but I have the satisfaction of knowing that, if I have committed an error, it can be corrected by an appellate tribunal.

F. N. BANGS for plaintiff.

E. H. OWEN, T. C. T. BUCKLEY and J. K. HEYWARD, for the defendants.—June 7th, 1871.

U. S. CIRCUIT COURT—W. D. WISCONSIN.

To render a mortgage void under the thirty-fifth section of the bankrupt act, it is not necessary that the debtor knew or believed himself insolvent. The section treats of insolvency as a condition of fact, not of belief, and with knowledge of which, and its consequences, he is chargeable in law.

It follows as a logical sequence, that when a man, insolvent in fact, gives a mortgage to one existing creditor, he does so with a view to give him a preference.

The bankrupt law of eighteen hundred and forty-one, and the Massachusetts insolvent law and decisions commented upon.

The act of eighteen hundred and forty-one declares void preferences made by a party *contemplating* bankruptcy; the act of eighteen hundred and sixty-seven includes those made by a party *being insolvent*, and the decisions under the former act are not always applicable to the present statute.

The question whether the debtor knew or did not know of his insolvency is unimportant in determining as to him; and the purpose of the act being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law, to secure the full benefit of this cardinal principle of the law.

The strict definition of insolvency, usually given in commercial centres, should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business; the rule should be in harmony with the general custom of the place.

If an insolvent gives a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the bankrupt act is complete as to both.

The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent—not what he *did* believe; the latter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency, that is for the court to determine, the security being attacked.

Hall, assignee &c. v. Wager & Fales.

Where a debtor had, during two years, paid off only a small portion of an overdue debt, had sold out the stock of goods for which the account was made, and transferred a part of the paper received therefor; had applied for extensions and been refused; had previously declined to execute a mortgage on the ground that it would injure his credit, and had been pressed by his different creditors; these facts constitute reasonable cause for belief of insolvency, and the creditor cannot escape from the consequences of knowledge of them.

HALL, assignee, &c. v. *WAGER & FALES.*

HOPKINS, J.—This is a suit in equity, brought to set aside a mortgage given by Leonard Lakin, the bankrupt, to the defendants, Wager and Fales, on the ground that it is void under the bankrupt act.

The mortgage is for three thousand dollars, dated December fifteenth, eighteen hundred and sixty-nine. It was given to secure a debt of that amount owing by Lakin to the firm of Wager & Fales, for balance due for stoves sold him by them in eighteen hundred and sixty-seven. The stoves were sold on four months' time, and the debt had been standing on account past due, until the giving of this mortgage. Notes were then executed, and made payable, six hundred dollars in six months; six hundred dollars in twelve months; six hundred dollars in sixteen months; six hundred dollars in twenty months, and the balance in twenty-four months, with interest at ten per cent. The account against the bankrupt was, in eighteen hundred and sixty-seven, about four thousand dollars, and he paid, in eighteen hundred and sixty-eight, a little less than five hundred dollars, and in eighteen hundred and sixty-nine, only two hundred dollars, which he paid in July. In February, eighteen hundred and sixty-eight, he asked for an extension, and agreeing to make small payments, but none was formally given. In March, eighteen hundred and sixty-nine, he asked for another extension, but none was given. In July, eighteen hundred and sixty-nine, the defendants sent their agents to him for settlement, and asked for a mortgage to secure it. He declined then to give it, and wrote defendants, July ninth, eighteen hundred and sixty-nine, that if he gave a mortgage it would injure his credit. He agreed then to make small remittances,

but did not do so, and they, in October, eighteen hundred and sixty-nine, sent their claim to Richardson, their agent, at Janesville, to get it secured by mortgage, and on the fifteenth of December, through him, they obtained the mortgage in question. In eighteen hundred and sixty-eight Lakin built a new store at a cost of from six to eight thousand dollars. In eighteen hundred and sixty-eight he sold out his stock of stoves to other parties and gave up the stove business. He continued to do business as a retail hardware merchant, with a tolerably fair credit at home and with his creditors, but he had not met his payments, and there was, on the fifteenth of December, about fourteen or fifteen hundred dollars past due, a portion of which had been due for quite a long time; he had secured Pierce & Whaling's claim by note given by the purchasers of the stoves; he had been pressed for over a year by his creditors; had borrowed money at banks by means of endorsers, and got renewals of the same; had used funds held by him as treasurer and in trust in his business, and failed to pay them over on demand.

In August, eighteen hundred and sixty-nine, he gave a mortgage to secure his father-in-law thirty-two hundred dollars, borrowed money.

He was, beyond all question, I think, insolvent—owed more than his property would pay—and had been so for over two years, when he gave the mortgage to the defendants, although he swears that he did not suppose that he was, but, on the contrary, that he thought he was worth ten thousand dollars over and above all his debts. Soon after giving the mortgage, his other creditors instituted an investigation into his affairs, and it was made apparent that he was insolvent; that he then attempted to compromise, but failed to accomplish it, and on the eighth of January, eighteen hundred and seventy, twenty-four days after giving this mortgage, he filed his petition in bankruptcy.

Mack, of Sandusky, Ohio, swears that Wager told him in May, eighteen hundred and sixty-nine, that he thought Lakin insolvent, and that he intended to send out and get a

mortgage to secure his claim. Wager denies that he said so, but says that Mack told him at that time that he, Mack, thought he would not stand it long, but that he told him he knew better, and that he was good, and Mr. Wager is partially sustained in his version by a Mr. Spencer, who was present. The defendants swear that they considered him worth ten or fifteen thousand dollars over his debts when they took the mortgage. These are substantially the facts in the case, and the complainants' counsel claim that they entitle the complainants to the relief asked. The defendant's counsel claim that the facts fail entirely to make out a case under the bankrupt act. He contended that to avoid the mortgage, it must be shown that Lakin was insolvent when he gave the mortgage, and that he knew it, for if he did not know that he was insolvent, he could not be said to have given the mortgage with a view to give the mortgagees a preference which it would be necessary for the court to find, as a question of fact, under the thirty-fifth section of the bankrupt act, in order to avoid the mortgage.

The meaning of that part of the section is not entirely clear, and has been construed differently by the courts and judges who have been called upon to pass upon it. But I cannot concur with the defendant's counsel in his interpretation of it. The section does not require the debtor to know his insolvency, or believe it. It treats of insolvency as a condition of fact, not of belief. He cannot set up his ignorance of that condition to defeat the operation of that section. He is presumed to know, and is chargeable with knowledge of it, and neither ignorance or wilful blindness will exonerate him from the operation of its provisions; so that being insolvent in fact, and chargeable by law with knowledge of such condition, it would follow, it seems to me, as a logical sequence, that he gave the mortgage with a view to give the defendants a preference, for, not having property to pay all his creditors, the giving the defendants security to pay them in full, necessarily operated as a preference, and he should be held as having intended the natural and logical consequences of his

acts. This section of the bankrupt act is almost a literal copy of section eighty-nine of the Massachusetts insolvent law, and their court, before its adoption by Congress, had placed this construction upon it. Perhaps, if the bankrupt had any reasonable cause to believe himself solvent, it might be held that he did not give the security with intent to give a preference. But, treated as a rational man, and looking at the facts of his case as they really were, could Lakin reasonably have believed he was solvent? A case might arise in which a court might hold that a party had reasonable cause to believe himself solvent when he was in fact insolvent, but it would have to possess some peculiar features, and the party would have to furnish a very satisfactory excuse for want of a knowledge of the facts showing his insolvency. This does not present such a case. From the facts of this case, it does not seem possible that he could have believed himself solvent when he gave this mortgage. The case of *Jones* v. *Howland*, 8 Met. 377, relied upon so strenuously by defendant's counsel, arose under the bankrupt act of eighteen hundred and forty-one, and the superior court of Massachusetts have not followed that as applicable to their insolvent law, from which this section of the bankrupt act of eighteen hundred and sixty-seven, under consideration, was copied. Chief Justice Shaw, in delivering the opinion of that court in *Holbrook* v. *Jackson et al.*, 7 Cush. 136, 150, says: "The provision of the bankrupt law of the United States, under which the case of *Jones* v. *Howland* was decided, was very different from the present; it turned on the question of actual belief and intent, and not on reasonable ground to believe," and in the same opinion, page 149, he says: "We do not think it necessary, in order to avoid the conveyance, that the debtors knew that they were insolvent, or, in fact, contemplated proceedings in insolvency; it is enough that they were in fact insolvent and had no reasonable cause to believe themselves solvent." That court again, in *Vennard* v. *McConnell et al.*, 11th Allen, 562, says: "That the proposition cannot be sustained consistently with the established rules of law; that the payment of a debt

by a party who is insolvent cannot be regarded as a preference, if made with the hope and expectation of the debtor that he will be able eventually to pay all his debts in full, the adjudicated cases leave no room for doubt on this point." —*Thompson* v. *Thompson*, 4 Cush. 127; *Lee* v. *Kilburn*, 3 Gray, 594; *Holbrook* v. *Jackson*, 7 Cush. 136, 149; *Barnard* v. *Crosby*, 6 Allen, 327. And in 13th Gray, *Beals* v. *Clark*, page 21, the court says: "That the jury were rightly instructed that it was competent for them to infer from the fact that Clark did give a preference to the plaintiff, that he intended to give it."—*Denny* v. *Dana*, 2 Cush. 172.

These cases fully show that the courts of Massachusetts have not regarded the case of *Jones* v. *Howland*, as giving a construction of their insolvent law, and I am not satisfied that the United States courts that have attempted to adopt that as a proper construction of the provisions of our present bankrupt act, have not examined the provisions of the two bankrupt acts critically, nor the insolvent law of Massachusetts, and the constructions given to that section in regard to preferences by the courts of that State, for if they had, they would at once have seen that the provisions of the act of eighteen hundred and forty-one, under which that was given, were entirely different from the present act, and that that decision had uniformly been held there as not applicable to the provisions of their insolvent law.

The weight of authority in the Federal courts, I think, is largely in favor of the construction I have given to that section.—3 N. B. R. 101, *ibid*, 84, *ibid*, 93, *ibid*, 29, 1 *ibid*, 81, *ibid*, 146, 4 *ibid*, 146.

The preferences declared void by the second section of the act of eighteen hundred and forty-one, were such as were made by a party *contemplating* becoming a bankrupt under the act. Then, the intent of the debtor was the principal question. Under the present act, a preference created by a party "being insolvent," is made void, and his intent and belief is not in question. The fact of insolvency being established or admitted, the preference, ordinarily, as to the debtor, is pre-

sumed to be void—the presumption being strong or slight, according to the circumstances of each case. But I cannot see that the fact that the debtor knew or did not know of his insolvency at the time of creating the preference, has much to do in determining the question as to him.

The purpose of the act being to enforce the equal distribution of an insolvent's estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption that is permissible, according to well settled rules of law, to secure the full benefit of this cardinal principle of the law. I would not go so far as to prevent the exercise of a reasonable *bona fide* effort on the part of an energetic and hopeful debtor, struggling with an honest intent to pay all his debts, for it is often the case that a trader may be embarrassed and unable to pay his debts as they mature, by the exercise of judgment and unreserved frankness with his creditors, goes through, pays all, and converts what was almost a calamity into a profitable enterprise. But to allow every embarrassed debtor to thus go on and sustain his acts, because he says he *thought* he could go through, and hold as valid his payments and securities, would be to defeat altogether the object and provisions of the bankrupt act.

I would not apply the strict definition of insolvency that is usually given in commercial centres, to traders doing business in smaller country places. In large commercial centres, a failure to meet payments as they become due, is deemed insolvency, but not so in the country; the custom of traders generally is different there, and a party should be held insolvent there only when he fails to meet his debts according to the usage and custom of the place of his business. But this laxity should not be allowed to that extent as to hold that non-payment for a long time, or continued *inability* for years to pay and meet obligations, should not be regarded as evidence of insolvency. I would not do away with all rule on that subject, but I would adopt a rule in harmony with the general custom of the place in which the party was engaged

in buisness, and testing Lakin even by that rule, I hold that he must be deemed to have been insolvent when he gave this mortgage. He had been behind in his payments for over two years; his business for that time did not yield him the money to pay up; he was urged for payments and could not pay; applied for extensions, which were refused, or if given, he failed to meet according to the new terms; used trust funds in his business; borrowed money at bank, and of his neighbors and clerks, and still was behind a great way in meeting his payments. To say, under such circumstances, that he should not be deemed insolvent, or that he had reasonable cause to believe himself solvent, would be indulging in a laxity of business conduct and judgment, entirely inconsistent with the views of business men in any community, and such as were never sanctioned by any court. To allow him any benefit of his plea of ignorance of his true condition under the circumstances of this case, would do violence to the common intelligence of the man, and impeach his business capacity to an extent far more damaging to him, than to say that he hoped by some fortunate turn of business to get out of his embarrassed situation. I therefore find in this case that Lakin, when he gave this mortgage to the defendants, was insolvent, and that he had no reasonable cause to believe himself solvent; that it was given to secure an existing debt; that it gave the defendants a preference over his other creditors, and in law he should be held to have given it with a view to give them such preference. But in order to grant them the relief sought by this bill, it is necessary that I should find that the defendants, when they received such mortgage, had reasonable cause to believe that Lakin was insolvent, and that it was made in fraud of the provisions of the bankrupt act. This last proposition, it seems to me, is a necessary conclu sion from an affirmative finding upon the facts. If an insolvent debtor gives a mortgage to one of his creditors, whereby he gives him a preference over his other creditors, and the creditor receiving the security has reasonable cause to believe the debtor insolvent when he receives it,

the fraud upon the act, as to both, is complete, and the last proposition, as I have said, is but a logicial conclusion, rather than an independent fact, or proposition necessary to be found in addition to the others, except as it naturally flows therefrom.

Chief Justice Shaw, in *Holbrook* v. *Jackson*, *supra*, page 131, says: "It must be reasonable cause on the part of the mortgagor to believe, not actual knowledge or belief, that he (the mortgagor) was insolvent."

The section itself declares, "having reasonable cause to believe," not believing, so that the question is, had they reasonable cause? Viewed in this light, the question as to what they did believe about his condition is immaterial, for if they had reasonable cause to believe he was insolvent, their security is void. They could not close their eyes to the evidence of his insolvency that they had before them, nor are they constituted the sole judges of the sufficiency of such evidence. That is for the courts to determine when the security is attacked.

Now in this case, I think defendants had reasonable cause to believe Lakin insolvent when they received the mortgage. This is the most difficult question under the testimony to decide, but I think, in view of all the facts and circumstances, they had reasonable cause to believe. This debt was over two years due; he had been in business all the while, but had only paid, in the two preceding years, about seven hundred dollars upon it; had sold out the stock of goods for which the account was made; had transferred a part of the paper received on that sale, as collateral security to other of his creditors; had repeatedly applied for extensions, which had been refused; had been repeatedly dunned, without success; refused, in July previous, to give them a mortgage, as a condition of an extention; wrote them that he thought such mortgage would injure his credit; was told by Mr. Mack, in November, at Sandusky, Ohio, that he thought he would not go through; these circumstances constitute, in my mind, a reasonable cause for them to have believed he was

insolvent. I have said before that such facts were evidences of insolvency, and that the law would pronounce a man thus situated, as insolvent. These facts were known to them, and I cannot see any way of escape for them from the consequences of such knowledge. They refused all extension without ample security, and insisted upon it, notwithstanding his remonstrance that it would injure his credit; that was sufficient of itself to put them on inquiry. His fear about his credit should have put them upon inquiring as to the situation of it, and the necessity for it. But they wholly neglected to investigate—now intent on security—purposely ignorant and blind, or meant to be, of his circumstances, until after they got the security. The giving of the security resulted as he thought it would; it caused an investigation into his affairs by his other creditors, which developed his insolvency, as Lakin must have known all the time it would, and, as I think, the defendants also had reason to think it would. Again, their agent was at Brodhead, in June, eighteen hundred and sixty-nine, at a time when, among the more public, prominent and business men of the village, his credit was freely canvassed in connection with the defalcation as to trust money, and it is scarcely credible that he should have been there at that time, and not heard anything about it, when he had so large a claim and so long past due. I, therefore, think the defendants had reasonable cause to believe Lakin insolvent when they received this mortgage from him, and that the giving of it was a fraud upon the bankrupt act, and that it is void, and I direct a decree declaring it void, and requiring the defendants to cancel the same upon the records, and if they fail to do so for a period of thirty days from the entering of the decree in this case, that then the register of deeds, of Greene county, upon recording a copy of the decree in this case, enter upon the record thereof: "This mortgage cancelled by decree of the circuit court of the United States for the western district of Wisconsin, and that the complainant recover his costs of the defendant, to be taxed."

I do not think this court in this suit has a right to exclude

the defendants from proving their debt; at all events, I do not feel disposed to pass upon that question in this case. The objection may be taken in the bankrupt courts if the creditors wish to exclude the claim of these defendants from participation in the distribution, and that court may allow or reject the claim, as it may see fit, without reference to the result of this suit.—June, 1871.

U. S. DISTRICT COURT—W. D. MICHIGAN.

A debtor has the right to appear and defend himself against a petition in bankruptcy; hence, although unsuccessful in his defence, the court has the power to allow him such expenses as may be just and proper, including attorney's fees, to be paid from the assets in the hands of the assignee.

An attorney is also entitled to be paid, out of the same fund, for services rendered to the bankrupt in securing the allowance of exemptions which were rejected by the assignee.

In re DAVID B. COMSTOCK and VAN E. YOUNG.

Comstock, one of the bankrupts, resisted the petition to have himself and Young declared bankrupts, as to himself, employing Rogers & Clay, attorneys, for that purpose. They appeared, and contested the adjudication prayed for as against Comstock. But the court adjudged the parties bankrupt.

Now comes Rogers & Clay, and ask that their services for Comstock be ordered paid by the assignee, out of assets in his hands, alleging the inability of Comstock to pay, because of his having been obliged to turn over to the assignee in bankruptcy all the company property, and all his individual, except such as the law exempts. The bankrupt's assets are not equal to fifty cents on the dollar of the debts proved.

Can payment be ordered from the assets in the assignee's hands?

WITHEY, J.—When a party is declared bankrupt in a proceeding in *invitum*, a warrant issues at once to the marshal to take possession of the bankrupt's property and effects; he

is thereby deprived of all control over his estate, save such as is exempt; he is practically without means with which to pay his attorneys for services in defending against the petition.

The amount which the bankrupt gets by exemption is, in most cases, trifling, and in no case is it so much but that he or his family are dependant for support on his personal efforts and earnings. Thus, we see, the law takes the bankrupt's property, and leaves him in no condition to pay an attorney for services rendered in contesting any doubtful questions as to the acts of bankruptcy charged in the petition; and yet the same law gives to the debtor the right to oppose, before a judge or a jury, the petition for adjudication. Suppose the debtor, in good faith, employs an attorney and pays him, (pending the litigation on the question of bankruptcy) subpœnas witnesses and pays them, obtains, it may be, documentary evidence, and disburses therefor, and is at the trial adjudged a bankrupt. Could the assignee turn round and successfully claim from the attorney, or any of the parties, any portion of the amounts so paid out, after notice of the petition filed? Would such payments by the alleged bankrupt be grounds for opposing his discharge? Clearly not.

In re Rosenfeld, 2 N. B. R. 50, it is held no ground for refusing a discharge that the bankrupt employed and paid attorneys from his assets, for resisting the proceedings in bankruptcy. The court, in that case, suggests that the bankrupt had no right to appropriate his assets for any such purpose, or for any other, and placed the discharge on the ground that no fraud was intended.

I am aware that *in re* Heirschberg, 1 N. B. R. 195, being a voluntary case, it was ruled, that an attorney's charges for services in behalf of the petitioning bankrupt, and for necessary disbursements incident to preparing and filing the petition, could not be paid by the assignee out of the funds in his hands belonging to the bankrupt's estate, under section twenty-eight. But I am not disposed, after carefully considering the various provisions of the bankrupt act, and viewing

both sides of the question, to adopt the ruling in that case. By section twenty-eight, "the fees, costs and expenses of suits, and the several proceedings in bankruptcy," are entitled to be first paid. Primarily, this may refer to such "fees, costs and expenses of suits, and the several proceedings" as go to the register, assignee and marshal, but in my opinion, when the debtor is given the right to appear and defend, and when the exercise of that right depends on the right to have of his property enough appropriated to pay the expense incident to appearing and defending, the court has the power, and of right ought to allow such expense as may be just and proper, to be paid from the assets in the hands of the assignee. For the law to lay its hands on all a man's property, and withhold it from his power to appropriate enough to meet the expense of a just defence of his rights, is equivalent to saying, You may defend, if you can, but your property shall all be taken from you so that you cannot defend. I will not believe, nor will I hold, that congress intended to deprive a party of the right to have enough of his own property appropriated to his use, to enable him to contest the doubtful questions which may be, and frequently are, involved as to the charge of acts of bankruptcy. I will not be so tender of the rights of creditors as to deprive the debtor of all chance to assert his rights, nor do I believe the law was ever intended thus to outrage and involve the debtor class. It is true the unsuccessful party in a litigation seldom recovers costs, yet sometimes he is allowed enough to meet the expenses of prosecuting or defending, as the case may be, where all his means are out of his hands, and are so far within the power of the court to control. But the question I am considering does not range itself within the reason which governs in ordinary suits, as to costs and expenses.

The court should be satisfied, before allowing anything, that the defence was fairly justified, and should scrutinize the charges made for any such defence.

I allow twenty-five dollars for resisting the petition in

this case, and the further sum of twenty-five dollars for services in securing the allowance of exemptions, which were rejected by the assignee. The assignee disallowed certain claimed exemptions, and the bankrupt was obliged to appeal to the court or lose what he was entitled to. His appeal was successful, and he should, on general principles, be allowed his necessary costs. The assignee is ordered to pay to Rogers & Clay the sum of fifty dollars, out of any funds belonging to the bankrupt's estate.—July, 1871.

U. S. DISTRICT COURT—N. D. NEW YORK.

Debts proved and filed with the register may be postponed for investigation before the assignee, and not allowed to be voted upon for assignee.

Efforts by the bankrupt's friends to compromise and buy up his debts, and stop proceedings in bankruptcy, are no fraud upon the bankrupt act, and are no reason why the debts should be postponed and not voted upon for the election of assignee.

Debts proved before election and sold and assigned after proof, must be voted upon by the actual owner and not by the original creditor, and the owner will be entitled to only one vote.

In re M. FRANK.

I, Benjamin G. Baldwin, one of the registers of said district, do hereby certify, that in the course of the proceedings in said matter before me, certain questions arose pertinent to the said proceedings, and were desired by counsel to be certified to the court.

At an adjourned first meeting of creditors, held on the thirtieth of March last, for the election of an assignee, E. M. Holbrook appeared as attorney for petitioning creditor, and S. A. Beman appeared with letters of attorney from sundry creditors, proofs of whose debts had been filed and entered at a previous meeting; and S. Foote also appeared with letters of attorney from several other creditors whose debts had also been before proved and proofs filed. Mr. Holbrook also had letters of attorney from several creditors, proofs of whose debts had been filed by Mr. Beman, revoking

their former letters of attorney given to Mr. Beman; and G. A. Seixas, Esq., appeared from New York as counsel with Mr. Beman, and in behalf of the creditor firm of Eldridge, Dunham & Co. of New York, proofs of whose debt had been filed by Mr. Beman, and moved that sundry debts, represented by Mr. Holbrook and by Mr. Foote, be postponed for investigation before the assignee, and be not voted upon; and charged that since the adjournment of this meeting, which was held on the third of March, then current, the brother and friends of the bankrupt, acting in his interest, had been to see the various creditors, and represented to them that the estate of the bankrupt would not pay fifty cents on the dollar of his indebtedness, and had made persistent efforts to induce them to compromise and stop these proceedings in bankruptcy; and that they had already succeeded in buying up, perhaps with the bankrupt's money, a large number of the debts now represented by Mr. Holbrook and Mr. Foote, some before and some since proof was made in this proceeding, and which, he charged, was done for the purpose of controlling these proceedings and influencing the election of an assignee, and was, therefore, in fraud of the bankrupt act, and was a sufficient reason for postponing such debts and not allowing them to be voted upon, and he proposed to prove such charge by reading affidavits and making oral proof.

Said Holbrook & Foote objected to such postponement, and insisted that nothing had been done in fraud of the bankrupt act; that the financial troubles of the bankrupt were destroying his health and mind, and that his friends, on that account, had examined carefully into the situation and value of his estate, and had offered the creditors to advance the money and pay as large a per cent. upon their debts as they believed could be realized upon a settlement in bankruptcy, with the hope that his mind might be relieved, and he be enabled to resume business; that several of the creditors had accepted the proposition made, and sold and assigned their debts before proof was made to Delos McCurdy, who, as such assignee, had made proof of the same in

due form and filed with the register, and several who had made proof of their debts and had the same filed, had also sold and assigned them, and said Holbrook & Foote insisted that the proof of both such classes of debts, being in due form and regularly filed with the register, and by him entered as satisfactory, they cannot now be postponed, but should be voted upon and may be investigated before the assignee hereafter.

I decided that, inasmuch as the offer was to show that the whole proceeding, in reference to the sale and transfer of such debts were in fraud of the bankrupt act, I would hear the proof, and if Messrs. Holbrook & Foote desired to make proof in opposition, I would give them reasonable time to prepare the same, to which ruling said Holbrook & Foote excepted, and desired that the same should be certified to the judge. The counsel then agreed that the meeting should be adjourned to hear such proof, and that they would serve copies of affidavits upon each other, and the meeting was thereupon adjourned to the twenty-first day of April at one P. M.

At such adjourned meeting the same counsel appeared as before, and affidavits were read and arguments made in support of the respective positions of counsel, and, after hearing the same, I decided that the proofs did not sustain the charge of fraud upon the bankrupt act, and that, as all the proof of debts on file was in due form, and nothing appeared to excite suspicion of their want of validity, I would proceed to receive votes for the election of an assignee upon all the debts represented, to which decision and ruling the counsel in favor of the postponement of debts excepted, and desired the same to be certified to the judge.

Before proceeding to vote, it was agreed by all the counsel that certain debts represented by Mr. Holbrook and by Mr. Foote, proofs of which had been filed by the creditors, were assigned to and now owned by Delos McCurdy, in addition to the debts proved by him as assignee, and that such of those creditors as had issued letters of attorney to Messrs. Beman & Brennan, had issued new letters of attorney to

Messrs. Magone & Holbrook, or either of them, and said Holbrook & Foote claimed the right to give one vote upon each of such debts in the name of the assignor, to which Mr. Seixas and Beman objected, and I sustained the objection, deciding that when a creditor sold and assigned his debt after it was proved in bankruptcy, he had no further business in court; that, although the proceedings must be carried on in his name, the actual owner and assignee must control the debt, vote upon it and receive the dividend, and that I should, therefore, receive only one vote from Mr. McCurdy or his attorney, and should decline receiving any vote from Mr. Holbrook or Mr. Foote upon those debts represented by them, and which were assigned to Mr. McCurdy, to which decision and ruling Mr. Holbrook and Mr. Foote excepted, and asked that it be certified to the judge.

Thereupon I proceeded to take the vote for assignee, with the following result, viz:

Eight creditors, whose debts amounted to four thousand and twenty-three dollars and thirteen cents, voted for Daniel F. Sofer of Malone, Franklin County, New York.

Five creditors, whose debts amounted to nine thousand nine hundred and two dollars and thirty-eight cents, voted for Charles E. Clark, of Ogdensburg, New York.

Nineteen claims, assigned after proof, amounting to twelve thousand two hundred and twenty-eight dollars and ten cents, were excluded from being voted upon, under my ruling aforesaid.

One debt of one hundred dollars and seventy-seven cents proved, was not represented, and one debt proved of two hundred and five dollars and twenty-one cents, represented by Mr. Beman, but the letters of attorney produced, although addressed to Mr. Beman individually, contained authority in the body of it to his law firm of Beman & Brennan, not to either of them, to vote, and the other partner not being present, I declined to receive a vote upon that debt.

There was no choice of an assignee, no one receiving a greater part, both in value and number of votes, and there being opposition, I certify the result into court.

The counsel desiring time to prepare statements to go up to the court with my certificate, the meeting was again adjourned to the first day of May, when statements are received from Messrs. Holbrook & Seixas, and are hereto annexed. The statement of Mr. Holbrook contains so full and accurate a history of the entire proceedings in this matter, that I refer to it as thus full and accurate to save repetition of many details in my certificate.

The affidavit and papers read on the motion to postpone debts are also sent up with this certificate.

It is proper that I should state that both gentlemen voted for are perfectly fair and competent for assignees—the said Clark residing at Ogdensburg, where the bankrupt resided, and Mr. Soper at Malone, Franklin county, fifty miles distant.

And it may not be improper that I should state that the bankrupt committed suicide shortly after the meeting of the twenty-first of April.

B. G. BALDWIN, *Register.*

HALL, J.—Upon consideration of the report of B. G. Baldwin, Esq., one of the registers of this court, dated May second, eighteen hundred and seventy-one, by which it appears that in the proceedings before him for the choice of an assignee herein, sundry questions arose and were desired to be certified for the opinion and decision of the judge of this court, but which were temporarily decided and passed upon by the said register, and that, under the decisions of the register, the creditors of such bankrupt proceeded to the selection of an assignee; but that on taking the votes of the creditors who had proved their debts, and were present or represented at the said meeting for the choice of an assignee, it appeared that there was no choice of an assignee by reason of the failure of a majority in number and value of such creditors to vote for the same person as assignee; and, also, upon consideration of the affidavit and statement presented in connection with such report of the said register, It is now ordered, adjudged and decreed, that the several decisions of

the register upon questions so certified by him, and the other questions arising in the course of such proceedings as stated in his report, be, and the same hereby are approved and confirmed; and that Charles O. Tappan, Esq., of Potsdam, in the county of St. Lawrence, counsellor at law, be, and he is hereby appointed assignee of the said Manassa Frank, in these proceedings, in pursuance of the statute in such case made and provided.—May, 1871.

UNITED STATES DISTRICT COURT—NORTH CAROLINA.

In May, 1863, a *feme sole*, being the owner, in her own right, of a chose in action, marries, and a suit is instituted shortly thereafter to recover from the debtor in the name of the husband and wife. This suit continues pending until 1868, when the husband, upon his own petition, was declared a bankrupt, and an assignee was appointed and an assignment executed in the usual form. Thereafter the assignee was, upon his own motion, by order of the court, made party plaintiff with the wife, and a judgment was recovered in favor of the plaintiffs.

Held, That the assignee may proceed to enforce the payment of such judgment by execution, and receive the money when collected—if this be done in the lifetime of the husband and wife—and if collected by him must distribute the same to creditors as the law directs. The assignee is deprived of no right because the bankrupt has failed to schedule such chose in action, nor by the provisions of the constitution in North Carolina, adopted in 1868.

In re WILLIAM BOYD.

BROOKS, J.—In this cause, a case agreed has been submitted under the provisions of the second clause of the sixth section of the bankruptcy act, presenting an important question for the consideration of this court.

After the argument of this question at Salisbury at the last special term, some of the authorities cited by the counsel not being acceptable, I was obliged to postpone its further consideration to enable me to make that careful examination of the authorities that the importance of the question demanded. The facts submitted are as follows:

Jane C. Forbes intermarried with Wm. Boyd in May, eighteen hundred and sixty-three, she being at that time the

owner of a slave that had been taken from her possession unlawfully prior to the said marriage by one Rader Winslow, who had sold and converted the same.

In September, eighteen hundred and sixty-three, suit was commenced in the superior court of Mecklenburgh county by Boyd and wife against Winslow for damages for the conversion of said slave. On the thirtieth day of May, eighteen hundred and sixty-eight, said Boyd filed his petition in bankruptcy, and soon thereafter was duly declared a bankrupt according to the provisions of the bankrupt act of eighteen hundred and sixty-seven. Subsequently, John Wilkes was duly appointed assignee of said Boyd, and an assignment in due form of all the property and effects of Boyd was made to Wilkes as assignee.

At fall term, eighteen hundred and sixty-nine, which was the trial term of the suit against Winslow, Wilkes, as assignee of Boyd, was made party plaintiff with Mrs. Boyd,—without her knowledge or consent—and judgment was recovered for eight hundred and fifty seven dollars and ninety cents damages, and nineteen dollars and ninety cents costs in behalf of the plaintiffs. The case further states that Boyd did not render any statement of this claim in his schedule, and was discharged as a bankrupt in the year eighteen hundred and sixty-nine, and the coverture still continues. And on this statement of facts this court is asked to decide whether Mrs. Boyd or John Wilkes, the assignee, is entitled to the money collected on the execution issuing of the judgment. If it had appeared that the execution which issued upon their judgment had been paid or in any way satisfied, and Wilkes, the assignee, had received the money, or if by any other means he had actually received the money for the judgment, I do not think there can be any authority found upon which to rest the claim of Mrs. Boyd to the money so received. But it is not stated that Wilkes, the assignee, has ever received the money. Then it is a question respecting the title to a chose in action of the wife that is prevented.

It must be remembered that the numerous cases, both

English and American, which so well settle the law in regard to the rights of the wife by survivorship to their choses in action, are not direct authorities upon the questions arising in this case, as it will be seen that they are all cases arising between the surviving wife and assignees or creditors of the deceased husband—or cases in which the wife's right to an equitable settlement are presented. And in this case it is the extent to which a husband may proceed during the life time of the wife in reducing her choses in action into his possession, and when the aid of a court of equity is not asked to effect that object. And yet a careful examination of the opinions of the learned chancellors in these cases have afforded me material assistance in arriving at a satisfactory conclusion upon the questions submitted in this case.

The facts stated render it necessary to make two principal inquiries:

FIRST, What rights did Boyd acquire upon his marriage in eighteen hundred and sixty-three in the chose in action against Winslow?

SECOND, Was any interest in that claim or right of action against Winslow, assigned or transferred to or vested in Wilkes, his assignee in bankruptcy, by force of the bankruptcy law? And if any, then the extent or character of such interest?

There are other questions which have been suggested, which may be regarded as rather incidental to these principal questions stated, and which may be considered, and will be necessarily involved in the answers to them. I regard it as having been clearly settled, both in England and in North Carolina, prior to the adoption of the provision in the present constitution, that by marriage the husband acquired the right to reduce to his possession his wife's *choses in action*, and when they were so reduced to possession by the husband during his coverture, such became absolutely his property.

In the case of *Bosvil* v. *Brandon*, 1 P. Hill, 485, and *Pringle* v. *Hodgron*, 3 Vesey, 617, the question was between a surviving wife and the assignees of a bankrupt and deceased

husband. All that was decided in the first of these cases was, that the wife was not entitled to aid of a court of equity, to take the writing out of the hands of her deceased husband's assignee, though the decision was founded upon a principle that I do not consider correct. That the assignment in bankruptcy so passed the property in the choses of the wife, that no other or further act was required to be performed. That the right to the debt was so vested in the assignee by operation of law as to defeat the right of the surviving wife. In the latter case, Lord Rosslyn lays down the same doctrine broadly. "That the assignee at law has a right to the *chose in action* of the wife, and the law reduces it into his possession; the bankrupt law gives over all that the husband had or could dispose of to the assignee; the property is vested by law in them, and the question of survivorship is quite laid aside by the bankruptcy." In *Miles* v. *Williams*, PARKER, C. J., in delivering the opinion of the court of King's Bench, notices this point, and expressed himself strongly in favor of the assignees against the claim of the wife. These I regard as extreme cases, and they were very clearly so regarded by the eminent chancellors to whom the same questions were presented afterward for decision.

In the case of *Grey* v. *Kentisch*, 1 P. Will, 249, and *Gayer* v. *Wilkinson*, 1 Bruce, 50, the same question was decided in favor of the surviving wife against the assignees, and in the subsequent case of *Mitford* v. *Mitford*, 9 Vesey, 87, Sir Wm. Grant, then master of the rolls, places his decision in favor of the surviving wife upon the same ground, that the chose was not reduced into possession by the husband or any assignee of his during their coverture. If in this case there was presented the claim of a *surviving wife* to her chose in action, not actually reduced into possession by her deceased husband, but assigned for a valuable consideration by him in his life time, though I would be strongly inclined to favor the wife's claim, yet I admit that the conflict between the very eminent judges before referred to, would of itself be sufficient to require a very careful consideration before so

deciding. In this case, however, such an assignment is not insisted on, but only such an assignment as the law makes, as incident to the bankruptcy proceedings in Boyd's case; and it is contended that by force of these proceedings, Wilkes was vested with all the rights, interests and estate that Boyd acquired by virtue of his marriage. And in reference to this demand against Winslow, the right to enter upon and continue the prosecution of the suit, and if during the joint lives of Boyd and wife judgment was recovered, to enforce payment of the same and receive the money.

It is quite clear, I think, that at the time the suit against Winslow was instituted, Mrs. Boyd could not have sued and recovered in her own name, or have released Winslow from the claim; and it is clear that Boyd could so far control his wife's interest as to sue as he did sue, or to have released the demand, without and even against consent of his wife. The right of the husband to recover and receive payment during coverture, is not only absolute at law, but exclusive. The wife (although the property is hers) cannot give a discharge. If the debtor pays the money to the wife without the husband's authority, he may be forced to pay it over again to the husband. In the case of *Palmer* v. *Trevoir*, 1 Vene. 261, this is expressly held. In that case a testator had bequeathed to the plaintiff's wife one hundred pounds, to be paid within six months after his death, and a bill being filed for this legacy, the defence which the executors made was that he had paid the legacy to the plaintiff's wife, and had her receipt for the same. The executor insisted further, that at the time of the making of this will, the plaintiff and his wife were separated, which was well known to the testator. But the Lord Keeper North held it to be no good payment, and decreed the legacy to be paid over to the husband with interest. This, at first view, would seem to be an extreme case, but high as the authority is, it is for me to consider now to what extent the law has been changed since that time. Since the decision last referred to, the law on the subject of the wife's chattles, personal, outstanding or *choses*

in action, underwent an elaborate examination by a learned and industrious judge, Sir Thomas Plummer. In the case of *Purdie* v. *Jackson*, 1 Russell, 1, after the most patient examination of the law, that learned judge observes, "that although the nature of the husband's interest is peculiar, yet the law defines it in the clearest manner." Marriage, he says, is only a qualified gift to the husband of the wife's *choses in action*, upon condition that he reduces them into possession during its continuance. The wife's title is not divested by the marriage. The *chose in action* continues to belong to her, so that if the husband happened to die before his wife, she, and not his personal representative, will be entitled to it. Reduction into possession is necessary by the husband or by his authority, to defeat the wife's right if she survive him. Yet it was held by more than one eminent English judge, that an assignment by the husband during coverture of the wife's choses in action, passed the title to the chose to the assignee so effectually, that the subsequent death of the husband did not restore the right to the surviving wife, though still uncollected, and that such assignee could sue for and recover the same.

I do not mean to be understood as affirming this principle, but I have been forced to the conclusion that the assignment in bankruptcy vests in the assignee all the rights of the husband to the *choses in action* of the wife, existing and accruing from marriages contracted before the adoption of our present state constitution. And as a consequence, the assignee may do all that the husband might do without such assignment, and that this embraces the right to sue for, recover and receive such *choses in action* as that in question in this case; and having the right to recover, he must use due diligence in his efforts to collect, and having collected it in the lifetime of the husband, he must distribute the same to creditors as the law provides. It can make no difference in regard to the rights of the assignee, if the *chose in action* has or has not been placed in the schedule by the bankrupt. —March, 1871.

U. S. DISTRICT COURT—MAINE.

(In Equity, May 10, 1871.)

The defendant sued the bankrupt to recover a debt, when he knew, or had reasonable cause to believe his debtor was insolvent. Judgment having been rendered, upon the default of the debtor, who did not appear or answer to the action, the execution creditor seized the real estate of the debtor which was attached on the writ, and proceeded to complete his levy. After rendition of the judgment, and before the levy was completed, the debtor filed his petition in bankruptcy, and his assignee applied to the bankrupt court for an injunction to restrain the defendant from proceeding with his seizure and sale of the estate of the bankrupt on the execution, the attachment being within four months of the commencement of the proceedings in bankruptcy.

Held, That the relief prayed for should be granted, and injunction made perpetual. Cases, *Black* v. *Secor*, 1 N. B. R. 51, *Beattie* v. *Gardner*, 4 N. B. R. 106, approved.

HASKELL, assignee &c., v. *INGALLS.*

Fox, J.—Cleaves was adjudged bankrupt on his own pettion, filed March seventeenth, eighteen hundred and seventy-one, and the plaintiff has been duly qualified as his assignee.

On the twentieth of December last, the respondent attached, on a writ against Cleaves, returnable at the January term, all said Cleaves' real estate. The action was duly entered, the defendant defaulted, and judgment rendered January thirtieth. The real estate attached was seized on the execution February twenty-first, and thereupon, before any levy was completed, on the twelfth of April, the assignee instituted this suit, to enjoin further proceedings upon said execution against the estate of the bankrupt, on the ground that a fraudulent preference would be obtained. The case is submitted on bill, answer and agreed statement. It is admitted, that on the twentieth of December the bankrupt was insolvent; the debt due Ingalls was for money lent by him to the bankrupt in September last, to be repaid in thirty days. The answer admits that the respondent, previous to commencing his action, had called upon Cleaves several times for payment; that he had always promised to pay in a few days, but always failed so to do; that he knew other suits

had been commenced against Cleaves, and his property attached thereon. The bankrupt being then insolvent, having thus repeatedly failed to pay borrowed money when pressed for payment, and the respondent having been compelled, with other creditors, to resort to legal process to obtain security for their demands, I hold he must be held to have then had reasonable cause to believe the bankrupt insolvent, as is required by the provisions of the bankrupt act to invalidate a preference.

The bankrupt must be deemed to have intended a preference to the attaching creditors, as he allowed their suits to proceed forthwith to judgment and execution against him, and he delayed taking any steps to avail himself of the provisions of the bankrupt act, and vacate the attachments until the rights of the creditors had not only ripened into execution, but they had actually seized his real estate thereon, and were proceeding to dispose of the same in satisfaction of their claims. All this the bankrupt could have obviated by answering to the actions, and filing his petition to be decreed a bankrupt. The inevitable consequence of his acquiescence in the actions of the creditors, was to give them a preference. His intentions, as well as those of the creditors, must be judged by the legal consequences of their conduct, and I therefore find that the bankrupt did intend to give, and the respondent, in fraud of the act, did intend and attempt to obtain, a preference over the other creditors, by the suit and proceedings under it.

The case does not find that the bankrupt procured the attachment to be made, or the seizures on execution of his property; but it does most clearly establish that he, being insolvent, suffered his property to be attached, and afterwards taken on legal process, with intent to give a preference to an attaching creditor; thus an act of bankruptcy is shown, for which, most certainly, he could have been adjudged a bankrupt on a creditor's petition, if filed within six months; and if Cleaves were an involuntary bankrupt, the present bill could certainly be maintained, as the volumes of

the NATIONAL BANKRUPTCY REGISTER contain at least a score of authorities, in which, in similar cases, creditors thus obtaining a preference by legal process, have been enjoined against further proceedings, or required to refund the amount thus collected by them in fraud of the act.

The proceedings in bankruptcy having been commenced within four months of the attachment, all rights by virtue of such attachment were dissolved, under the provisions of the fourteenth section of the act, and the respondent is compelled to rely on his alleged lien, by force of the seizure of the estate on the execution on the twentieth of February last, after Cleaves had committed an act of bankruptcy, by suffering his property to be attached on legal process by the respondent. It is claimed that the creditor, not having instituted involuntary proceedings, but having allowed Cleves to proceed in his own behalf, as a bankrupt, the case is not affected by the provisions of the thirty-ninth section, but must depend on the thirty-fifth section, "relating to preferences and fraudulent conveyences;" that whilst by the thirty-ninth section the procuring or suffering of his property to be taken on legal process by an insolvent, intending a preference, is declared an act of bankruptcy, and is clearly in fraud of the act, yet by the provisions of the thirty-fifth section, it is only when such insolvent, with such intent, *procures* his property to be attached or seized on execution, that the attachment or seizure is declared void—that, *ex industria* the *suffering* by an insolvent, of his property to be thus attached or seized, is not denounced, and such an attachment or seizure on execution is not declared void, when the debtor is not active in procuring it to be made, but is only passive, allowing the law to take its usual ordinary course, and apply his property by due process of law in discharge of his liabilities.

It is true that the thirty-fifth section does not in express words, declare an attachment or seizure on execution void, which an insolvent suffers to be made and continue upon his property, but after declaring that if an insolvent, with intent

to give a preference, procures any part of his property to be attached or seized on execution, the same shall be void, it further provides, that if such debtor makes any payment, pledge, assignment, transfer or conveyence of any part of his property, either directly or indirectly, absolutely or conditionally, the person recivinge such payment, &c., having cause to believe such person is insolvent, and that the same is made in fraud of the act, the same shall be void; and if not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud. The taking of a debtor's property on legal process cannot be said to be in the ordinary course of his business.

In the case of *Black and Secor*, 1 N. B. R. 81, judge Blatchford, in a most able opinion, which has been cited and approved by nearly every one of the district judges, has examined this question elaborately and with great care. It was a case of involuntary bankruptcy, where the party had *suffered* his property to be taken on execution, and was clearly within the thirty-ninth section. After demonstrating such to be the case, the learned judge proceeds: "The same result follows under the thirty-fifth section. The two sections are in *pari materia* and must be construed together. There is, however, no conflict between them, and they are of the same purport and tenor. * * * * The act of suffering the creditor to take the property of the firm on legal process, the firm being insolvent, when such taking could have been prevented by an application in voluntary bankruptcy, was a fraud on the provisions of the act, and must be held to have been a transfer made by the debtors and with a view to give a preference to the creditors. The creditor was to be benefitted by the transfer, and had reasonable cause to believe the firm to be insolvent, and that the transfer was made in fraud of the provisions of the act. The transfer was not made in the usual and ordinary course of the debtor's business, and therefore it was void, and the assignee is entitled to recover the property transferred or its value." The decision in the case of *Davidson*,

3 N. B. R. 106, covers this point. It was a voluntary bankruptcy, and Judge Blatchford there held that the debtor committed an act of bankruptcy in suffering his property to be taken on legal process; that thereby the creditor obtained a preference, and not having surrendered the property, he could not prove his claim, and the sheriff was required to pay to the assignee the amount thus collected on the execution.

The bankrupt act was intended to prevent all preferences by an insolvent within four months of the commencement of proceedings in bankruptcy, and to insure an equal distribution of his estate among his creditors. I cannot believe that a seizure of an insolvent's estate on execution, and by which, if perfected, gross injustice will be perpetrated against the general creditors, can avail a creditor if the insolvent should immediately file his petition to be adjudged a bankrupt, whilst it would be set aside and adjudged void if the creditors should succeed in the case and first procure a decree of bankruptcy against him. Such a construction of the law would cause the validity of the seizure to depend entirely on the alacrity and diligence of the insolvent. At the moment the seizure was made by an officer, he could file a petition, thereby preventing his creditors from commencing proceedings against him, by which the seizure would be defeated. Opportunity for fraud and collusion, and for the indirect preference of favored creditors would thus be obtained, which would go far to defeat the great and leading object of the bankrupt law.

This construction of the law, I think, is sustained by the decisions in *Wilson and Brinkman*, 2 N. B. R. 149; *Fitch* v. *McGee*, *ibid* 104; *in re Wells*, 3 *ibid* 95; *Street* v. *Dawson*, 4 *ibid* 60; *Beattie* v. *Gardner*, *ibid* 106; *Smith* v. *Buchanan, et al.*, *ibid* 133, and *Vogel* v. *Lothrop*, *ibid* 147. Most of these were cases of involuntary bankruptcy, but this distinction is not, that I can perceive, made the ground of the decision and relied upon in either of the opinions. On the contrary they all seem to establish the principle that as a payment of

money would be a preference, the obtaining of it by legal proceedings, not prevented by the debtor availing himself of the law, is adverse to the fundamental principles of the bankrupt act, and is invalid as against the assignee.

In *Beattie* v. *Gardner, et al.*, 4 N. B. R. 109, Judge Hall says: "It can scarcely be doubted that an act which directly and manifestly tends to defeat the purposes and policy of the bankrupt act, and which was done in contravention of and with an intent to defeat such purpose and policy, is for that reason fraudulent and void," as said by Lord Mansfield, in 2 Cowper, 629, "a fraudulent contrivance with a view to defeat the bankrupt laws is void, and annuls the act."

This principle has received the emphatic approval of the supreme court of the United States. In *Shawhan* v. *Wherritt*, 7 How. 627, GRIER, J., in delivering the opinion of the court says: "The policy and aim of the bankrupt law are to compel an equal distribution of the assets of the bankrupt among his creditors; hence when a merchant or trader, by any of the tests of insolvency, usually termed acts of bankruptcy, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably." * * * A creditor may always receive payment of his debt or security for it, from his debtors, unless he has notice or knowledge that his debtor has committed an act of bankruptcy, and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over other creditors of the bankrupt; and if notice of this fact to a creditor makes a payment void, it is obvious that a security or priority gained by suit in a state court, after such notice, could have no better claim to protection, for notice of the act of bankruptcy is the test of the *mala fides* which vitiates the transaction." In that case a party was compelled to refund to the assignee the amount he had obtained from the bankrupt's estate by proceedings in the state court.

"These doctrines, thus held to be applicable to the act of eighteen hundred and forty-one, are said (2 Benedict, 208, by Judge Blatchford), to be much more applicable to the act of eighteen hundred and sixty-seven, as it was the intention of congress by that act to strike at the root of all preferences obtained by a creditor, when his debtor is insolvent or in contemplation of insolvency by the taking of the debtor's property on legal process, whether the taking be by an act of procurance or an act of sufferance where there is an intent on the part of the debtor to give such preferences, and the creditor has reasonable cause to believe that the debtor is insolvent."

The present bill may well be maintained, both on the express provisions of the bankrupt act and the general principle that the acts of the respondent in thus obtaining a preference were fraudulent and void, being intended by both the bankrupt and the respondent to defeat the purposes and policy of the law.

Perpetual injunction to restrain the respondent from proceeding with his seizure and sale of the estate of the bankrupt on the execution recovered against him by said respondent.

HASKELL, *pro se.*; DAVIS & DRUMMOND, for defendant.

U. S. DISTRICT COURT—N. D. OHIO.

Where a party files separate proofs of debt for the same amount against the individual members of the firm, the claims must stand as proven, and the motion of the assignee that they be stricken from the list, will be overruled.

In re BEERS et al.

I, Henry C. Hedges, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and was stated and agreed to by the counsel for the opposing parties, to wit:

On the twenty-fifth day of June, eighteen hundred and seventy, Daniel Struble and N. M. Young made their proof and caused to be filed their claim against William L. Merrin, as an individual, for four thousand three hundred and twenty-six dollars and thirty cents, which proven claim is herewith certified.

On the twenty-second day of March, eighteen hundred and seventy-one, said Daniel Struble and N. M. Young made their proof and caused to be filed their claim against John Beers, as an individual, for four thousand three hundred and twenty-six dollars and thirty cents, which proven claim is herewith certified.

On the twenty-second day of March, eighteen hundred and seventy-one, the assignee filed his two motions to strike from the list of proven claims said claims against said Wm. L. Merrin, and against said John Beers, which motions are herewith certified.

Now, Mr. Geo. A. Clugston, attorney for S. S. Tuttle, the assignee, and W. C. Cooper, Esq., who appeared for the creditors, Struble & Young, stated and agreed as follows: "That the original indebtedness now proven was the indebtedness of Daniel Struble, N. M. Young and Wm. L. Merrin as partners under the firm name of "The Bank of Fredericktown." That Wm. L. Merrin and John Beers, on the nineteenth day of April, eighteen hundred and sixty-nine, bought out all the interest of said Struble and said Young in said bank, and agreed to save harmless said Young and Struble against all liabilities of said firm, which agreement was reduced to writing, and a copy thereof is attached and marked A. as an exhibit in each proof; that afterwards Wm. Gilmore and Luther Smith bought into the said bank, and assumed with Beers and Merrin all liabilities; that the indebtedness stated in the proof of said Struble & Young, against William L. Merrin's estate, and against John Beers' estate, was not paid and satisfied by said John Beers or William L. Merrin, nor by the new firm of "The Bank of Fredericktown," composed of William L. Merrin, John Beers, William

Gilmore and Luther Smith, but was satisfied by said Struble & Young.

It is claimed by said W. C. Cooper, attorney for said Struble & Young, that the proven claim should stand as a proven claim against *Wm. L. Merrin's estate*, and that the proven claim should stand as a proven claim against *John Beers' estate*, and that said Struble & Young are entitled to any dividend that may be made out of the *individual assets* of Wm. L. Merrin, and also to any dividend that may be made out of the *individual assets* of John Beers. While it is claimed by Mr. Geo. A. Clugston, attorney for the assignee, that the two several proven claims against the separate estates of Wm. L. Merrin and John Beers each should be stricken from the list of proven claims; that said Struble & Young are not entitled to have a proven claim against the estate of Wm. L. Merrin individually, and the same claim against the estate of John Beers individually; but that in equity said claim should be proven against Wm. L. Merrin and John Beers, (as the old firm), or against Merrin, Beers, Gilmore & Smith as "The Bank of Fredericktown," and that there is no equity in allowing said Struble & Young to prove the same claim against Merrin's and again against Beers' estate.

On consideration whereof, it was by me ordered, that the motions heretofore filed by said assignee be *overruled*, and said proven claims stand as proven claims against said John Beers' estate. And the said parties request me to certify said matter to his honor, the district judge, for his action, which is done accordingly.

HENRY C. HEDGES, *Register*.

W. C. Porter, attorney for Struble and Young, assented to the action of the register.

Geo. A. Clugston, attorney for S. S. Tuttle, assignee, dissented to the action and decision of the register.

SHERMAN, J.—I approve the decision made above, and order the same to be so certified to the register.—March 23, 1870.

UNITED STATES DISTRICT COURT—N. D. ILLINOIS.

[MARCH TERM, 1871.]

The district court has no jurisdiction of an involuntary case in bankruptcy, unless it appears on the trial that the debtor, at that time, owes debts provable under the act exceeding the sum of three hundred dollars, and is indebted to the petitioning creditors in the amount of two hundred and fifty dollars. This is true even though the debtor, at the time of the filing of the petition, was indebted to exceed those sums. When his indebtedness, by subsequent payments, is reduced below those sums, the court loses jurisdiction.

The latter clause of the forty-first section of the act, was intended to allow the debtor to disprove all the material allegations of the petition.

Payments made by the debtor to the petitioning creditors are material facts on the issue in denial of bankruptcy, and the debtor can introduce evidence of such payments without a special traverse of the amount of his indebtedness.

The receipt of such payments by the petitioning creditors to an amount sufficient to reduce this indebtedness below the minimum established by the act, must be considered as a waiver of the alleged act of bankruptcy.

The petitioning creditors cannot add the costs paid and incurred by them to their debt in order to raise it above the jurisdictional limit. Such costs are not a part of their debt. The debtor must owe them two hundred and fifty dollars or they have no right to make costs. Nor can the creditors add counsel fees to their debt.

In this case, the respondent having been guilty at the time of the filing of the petition, was ordered to pay all costs up to the time of filing his denial, except the docket fee.

In re WILLIAM H. SKELLEY.

On the fifth day of July last, the firm of John V. Farwell & Co. filed their petition in this court, alleging that they were creditors of said William H. Skelley in a sum exceeding two hundred and fifty dollars, to wit: in the sum of nine hundred and eleven dollars and ninety-two cents. That said indebtedness was upon a promissory note for nine hundred and eleven dollars and ninety-two cents, given by said Skelley to the petitioners, bearing date on the third day of June, eighteen hundred and seventy, and payable to petitioners in fifteen days; that said Skelley owed debts to an amount exceeding three hundred dollars; that said Skelley, being a merchant and trader, was, on the fifth day of July, eighteen hundred and seventy, guilty of an act of bankruptcy within the meaning of the bankrupt act, by the suspension of payment upon his commercial paper, and failure to resume

payment thereof within the period of fourteen days. The commercial paper upon which he so suspended payment being the said promissory note. On the twenty-first day of September last, Skelley filed a denial of the alleged act of bankruptcy, and the issue was by argument of parties submitted to the court for trial without a jury.

On the trial the petitioner produced the note described in the petition, and showed that the sum was due and unpaid as set forth at the time the petition was filed. Proof was then introduced on the part of the respondent Skelley, showing that after the filing of said petition and before the filing of his denial, he had made payments on said note so as to reduce the amount due thereon at the time of the trial to less than two hundred and forty dollars.

The petitioners objected to said evidence as not being germane to the issue made by the pleadings, but the court heard the proof subject to objection.

It did not appear, from the evidence, that respondent owed any other debts.

It also appeared from the proof that the petitioners had advanced sixty-five dollars for costs in this proceeding, and had incurred liabilities for attorneys fees to the amount of two hundred dollars more.

BLODGETT, J.—The only question is, can the respondent be adjudged a bankrupt under this issue and proof?

It is clear that at the time of the trial, respondent was not indebted to the petitioning creditors in the sum of two hundred and fifty dollars. And it does not appear that he then owed debts to the amount of three hundred dollars. But it is contended on the part of the petitioning creditors, that inasmuch as the proof shows that respondent owed them much more than two hundred and fifty dollars, and owed in the aggregate much more than three hundred dollars at the time the petition was filed, the evidence of the reduction of the indebtedness by subsequent payments, is wholly immaterial and inadmissible.

It is manifest that this court has no jurisdiction to adjudge a person bankrupt unless such person owes debts to the amount of three hundred dollars, and is also indebted to the petitioning creditor or creditors in the sum of two hundred and fifty dollars; the subject matter is not within the jurisdiction of the court unless the indebtedness reaches the amount named. And I think the better rule is that under the issue made by the denial of bankruptcy, the debtor can introduce proof to contradict all the material allegations in the petition.

In at least two important cases to which my attention has been called, *Brock* v. *Hoppock*, 2 N. B. R. 2, and *in re* Moore, 1 N. B. R. 123, it has been held that the burden of proof rests upon the creditor and he must establish his debt before proceeding to show acts of bankruptcy. But without intending to fully endorse the rule laid down in those cases—as I do not deem it necessary to go so far in this case—the last clause of the forty-first section of the bankrupt act provides that, "if upon the trial the debtor proves to the satisfaction of the court or jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens are the sole ground of the proceeding, the proceeding shall be dismissed and the respondent shall recover costs," thus evidently intending to allow the debtor the right on the trial to disprove all the material allegations in the petition, or in other words to rebut the *prima facie* case made by the petition and the preliminary proofs filed therewith.

It seems to me the question is analogous to the question of jurisdiction of the parties in a suit brought in the Federal courts. If it appear at any time during the trial that the plaintiff is not entitled to sue in that court, his suit will be dismissed, although the right so to sue is not specially raised by the plea. So in proceedings in bankruptcy, if it appear at any stage in the trial that the case is not within the bankrupt law, the proceedings should be dismissed. It is true

some of the courts have held that the debtor should specially traverse the amount of his indebtedness to the petitioner if he wishes to raise that question, but the reasons assigned for this holding do not occur to me as in harmony with the well received rules of pleading, or the spirit and letter of the bankrupt act. I think, therefore, that the evidence as to the payments made by respondent to the petitioners after the filing of the petition, was admissible under the issue, and it appearing that by such payments the petitioners' debt is reduced below two hundred and fifty dollars, they have lost their standing in court to have the respondent adjudged a bankrupt.

The receipt of such payments seems to me a waiver by the petitioners of the act of bankruptcy alleged, so far as they are concerned, for if the respondent were to be adjudged guilty on their petition, the payments made to petitioners are certainly such payments as amount to preferences of themselves as creditors, and would prevent the petitioners from proving their debt.

I cannot presume that the creditors to whom these payments were made contemplated any such serious consequences to follow the mere receipt of part of their debt, but will rather presume, under the circumstances, that they intended to condone and waive the alleged act of bankruptcy.

The acceptance of these payments renders the petitioners incompetent to further urge or insist upon the act of bankruptcy. True, the petition is filed for the benefit of all creditors, but it is equally true that only creditors to whom the sum of two hundred and fifty dollars or upwards is due, can demand an adjudication, and that amount must be due at the time the court is asked to render judgment.

I ought, perhaps, before dismissing the subject, to notice the point made by petitioners in regard to the costs which have been paid and incurred by them, and which they claim constitutes a part of their debt against the petitioner.

This position seems to me wholly untenable. The debtor must owe his creditor two hundred and fifty dollars, and be

guilty of an act of bankruptcy before the creditor has any right to make costs for the purpose of having him adjudicated a bankrupt, and when the costs are made they are not added to the petitioners' debt, but the creditor may have them re-imbursed to him out of the debtor's estate if he is adjudged a bankrupt before any dividends are distributed, while he is only entitled to his pro-rata with other creditors on his debt.

As to the counsel fees incurred by petitioners, the courts of this state do not recognize them as any part of the costs to be recovered in a case, and in bankruptcy it is a matter of discretion with the court to allow them a reasonable amount against the estate.

In this case the evidence shows the respondent guilty at the time the petition was filed, and as no stipulation seems to have been made, I shall render judgment that the respondent pay all taxable costs except docket fees made up to the filing of his denial, and that on such payment the proceedings be dismissed.

U. S. CIRCUIT COURT—N. D. ILLINOIS.

A chattel mortgage void as against creditors under the state law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is also void as against the assignee in bankruptcy.

A mortgagee of a chattel mortgage loses his lien if he neglects to have it acknowledged and recorded as required by the state statute. Even though possession of the property was taken before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, it operates as a preference, and therefore void as against the other creditors, if done within the time limited by the present bankrupt act.

The taking possession does not remit this creditor to his rights as of the date of his mortgage.

HARVEY, assignee, v. *CRANE.*

DRUMMOND, J.—The jury having found a verdict for the plaintiff in this case, these must be treated as the main facts:

The bankrupt, in eighteen hundred and sixty-nine, was a merchant, and had a store of goods at Normal, McLean

county, in this State, and borrowed of the defendant, a resident of Chicago, four thousand dollars, for which he gave a note payable April first, eighteen hundred and seventy, and a chattel mortgage on the goods in the store. The mortgage was executed and duly acknowledged on the twentieth of March, eighteen hundred and sixty-nine. Afterwards there were some material changes made in the mortgage with the consent of the parties, but there was no re-acknowledgment. The mortgage purported in terms to include such goods, wares, and merchandise as the mortgagor should add to the stock during the time the debt was maturing. The mortgagor was to keep possession, but the mortgagee was authorized to take possession and sell the property before the maturity of the note in several contingencies, and among others, provided the mortgagor should seek or attempt to sell any part of the goods, *except in the usual course of business*, without giving notice to the mortgagee.

The mortgage was forwarded to and received by the mortgagee, and retained by him until the fourth of March, eighteen hundred and seventy, when he went to Normal, and on the fifth of March filed the mortgage for record in the proper office. In the meantime the mortgagor had been in possession, had made additional purchases, and had been selling the goods as usual. On the seventh of March the defendant, by his agent, took possession of all the goods in the store. At the time the mortgage was recorded, and the defendant took possession, Parr was insolvent, and the defendant knew it, or had reasonable cause to believe it. On the thirtieth of March, eighteen hundred and seventy, a petition in bankruptcy was filed against him. It has not been claimed that the mortgage was valid under the statute as against creditors. In fact, it not only was never acknowledged as it now stands, but it included after-purchased goods, and seemed to permit the mortgagor to go on and sell in the usual course of business. *Davis* v. *Ransom*, 18 Ill. R. 396.

It is not disputed but that the mortgagee had the right under a clause of the mortgage to take possession. The

record of the mortgage may be left out of the case, as it must be conceded that gave it no additional validity. There is no doubt that the mortgage was given for a *bona fide* loan.

The case then presents this question: Whether, conceding its validity between the parties, the defendant could retain the mortgage until the mortgagor became insolvent, and his creditors were pressing their claims by suit and otherwise, and then could take possession, and, unaffected by the altered condition of the parties, be remitted to his rights as they stood at the date of the mortgage, and thus obtain a preference over other creditors.

As between the mortgagor and mortgagee alone, it was immaterial whether or not the mortgage was recorded, or whether the mortgage provided for the possession by the mortgagor or for after-acquired property. Neither was it material whether the mortgagor sold the whole or any part of the property. All these things might be done, or omitted as they agreed. It is only where the interests of other parties are affected by these stipulations that their validity can be questioned. If a mortgage had been duly acknowledged and recorded at the time the loan was made, then it would have become a lien, provided it was valid under the laws of this State. (14th section of bankrupt law.)

But in this case it is claimed that a mortgage not valid as against creditors, under the laws of this State, has ripened into an effectual lien or transfer by virtue of the possession taken on the seventh of March, because, though the mortgagor was then insolvent, and the mortgagee knew it, proceedings in bankruptcy were not commenced until the thirtieth of March, and the assignee took as a purchaser, with notice of all equities. But there was nothing operative as against creditors until the defendant took possession. As against them, until then, the defendant had no security for his loan. Can creditors keep their papers and supposed securities in their pockets, and permit their debtors to go on and do business as owners of the property, and as soon as trouble threatens, watch their opportunity and sweep away all, simply by taking possession?

There are authorities which appear to hold that if the mortgage is *bona fide* when made and good between the parties, it is good against the assignee. (*In re* Griffiths, 3 N. B. R. 179.)

If it be true that the assignee takes as a purchaser and subject to all equities, and that a secret transfer is an equity, then it can make no difference whether the creditor take possession before or after the commencement of proceedings in bankruptcy, because if the possession relates back to the date of the secret transfer, and overrides all intermediate acts, then it would seem to follow that the assignee could not touch the property unless at the time of the supposed transfer there was some other objection than its secrecy. But we think it will hardly be contended that an unrecorded chattel mortgage, in the pocket of the mortgagee at the commencement of bankruptcy proceedings, would be valid against the assignee, though it might be against the mortgagor. Wynne's case, 4 N. B. R. 5.

The possession, after proceedings in bankruptcy were commenced, under an unacknowledged, unrecorded chattel mortgage, should have no different effect. And if this be so, the reason is because, after the pretended security was given, a fact has occurred (*e. g.*, the filing of a petition in bankruptcy) which gives a different aspect to the case, and it must be judged under the light of that fact.

The principle would seem to be the same in the case of a chattel mortgage, even though recorded, if void as against creditors under the law of the State. In each instance there would have to be something in addition to render it valid, as by recording or taking possession before proceedings in bankruptcy were commenced.

A creditor may obtain a preference from an insolvent debtor with knowledge of the insolvency, if within the limitation prescribed by the law. *Bean* v. *Brookmire*, 4 N. B. R. 57. But the possession must be obtained by a complete act within the limitation. Here the mortgage did not create the preference as against creditors, that was invalid; neither did the record.

It was still, when recorded, an invalid mortgage as against creditors, under the law of the State, among other reasons because as it stood it was an unacknowledged mortgage. That which operated against creditors, if at all, was the taking possession on the seventh of March. It is true it was authorized by the mortgage, and it was, in that sense, the joint act of the mortgagor and the mortgagee, possession being the consummation of the act. The assignee represents the creditors, and any claimed lien which would be void as against creditors generally, would also be void as against the assignee.

In this case the defendant cannot rely upon the mortgage, because it is invalid as to creditors under the law of the State. He cannot rely on the possession, because it was taken under authority from an invalid mortgage, and because, further, the mortgage was wrongfully used by the defendant to obtain possession, he at the time knowing the insolvency of the mortgagor.

The motion for a new trial must be overruled, and judgment be entered upon the verdict.—March, 1871.

U. S. DISTRICT COURT—N. D. NEW YORK

An assignee of a bankrupt firm takes by his assignment all the property of the firm and of the individual members thereof, even though part of the property may be out of the district in which the bankrupts reside, and owned in part by partners who have not been joined in the bankruptcy proceedings.

A discharge properly granted to the individual members of a firm will be available in respect to any indebtedness of any other partnership in which they were interested, and for whose debts they might be liable.

The creditors of the several partnerships are entitled to preference of payment out of the assets of the firm to which they respectively gave credit.

While proceedings are pending in one district, it is improper to grant an adjudication in another, as the petition first filed takes the precedence.

In re WARREN LELAND and CHARLES LELAND.

HALL, J.—On the fourteenth of April, eighteen hundred and seventy-one, a petition in bankruptcy was filed in this

court against Warren Leland and Charles Leland, constituting the firm of Leland Brothers, who had carried on business as hotel keepers, &c., at Saratoga Springs, in this district, for the six months next preceding the filing of such petition, and which business had been carried on by them in such firm name—they being the only members of such firm.

Upon the hearing of the motion for an adjudication in bankruptcy, under such petition, it was shown that on the twenty-fourth of March, eighteen hundred and seventy-one, a petition in bankruptcy had been filed against said Warren Leland and Charles Leland and one Simeon Leland, as partners under the firm name of Simeon Leland & Co.; that such petition was filed in the southern district of New York, where they severally resided, and in which they had carried on business as copartners in a firm consisting of the said Simeon, Warren and Charles Leland; that under said last mentioned petition, the said Simeon, Warren and Charles Leland were, on the first day of April, eighteen hundred and seventy-one, adjudicated bankrupts; that on the twenty-ninth day of April, eighteen hundred and seventy one, the register to whom the case had been referred, executed an assignment to Edward B. Wesley, (who had been appointed assignee of such bankrupts), of all the estate real and personal of the said Simeon, Warren and Charles Leland, including all the property of whatever kind in which they were interested, &c.; and that under such assignment said assignee had taken possession of all the property of said Warren Leland and Charles Leland in this district, and then held the same claiming the right so to hold it as such assignee.

It was conceded that the said Simeon, Charles and Warren Leland, were all residents of the said southern district, and that their domicile was in that district during the six months next preceding the filing of each of said petitions; and that the petition so filed against them in the southern district, was filed before any petition was filed by or against any or either of them in this district.

It was not claimed on the part of the petitioning credit-

ors in this case, nor does it appear from the petition herein, that the acts of bankruptcy charged in their petition were not committed prior to the filing of the said petition in the southern district; nor was it claimed that Warren Leland or Charles Leland had come into the possession of, or become entitled to any property after the filing of such last mentioned petition, and before the filing of the petition in this case. It also appeared by the petition in this case, that the debt of the petitioning creditors on which such petition was founded was contracted prior to the filing of the petition in the southern district.

Under this state of facts, it was insisted by the respondents that this court ought not to proceed to an adjudication in this case, and that the assets and property of the firm of Leland & Brothers, as well as of the firm of Simeon Leland & Co., and the separate estates and properties of the several members of the firm last named, passed to the assignee so appointed in the southern district, and should be applied to the payment of the debts of such firms and of such bankrupts individually, under the direction or control of the bankruptcy court of the southern district. On the other hand it was insisted that the firm of Leland Brothers was as distinct from the firm of Simeon Leland & Co., as though the two firms were composed of entirely different persons, and that the assignee appointed under the proceedings in the southern district had no right to the property and assets of Leland Brothers; and that this court should proceed in this case so as to allow the joint estate of the firm of Leland Brothers to be administered by an assignee chosen by the creditors of the firm, and not by an assignee in whose selection they could take no part.—Bankrupt act section thirty-six.

The thirty-sixth section of the bankrupt act which relates exclusively to the bankruptcy of partnerships, and which must be considered in connection with the questions under discussion, enacts, "that where two or more persons who are partners in trade shall be adjudicated bankrupt, either on the petition of such partners or any one of them, or on the peti

tion of any creditor of the partners, a warrant shall issue in the manner prescribed by this act, upon which all the joint stock and property of the copartnership and also all the separate estate of each of the partners shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate account of the joint stock or property of the copartnership, and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint-creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective rights and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such partners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case."

The sixteenth general order in bankruptcy, which relates to the filing of petitions in different districts, must also be

considered. It is in the following words: "In case two or more petitions shall be filed against the same individual in different districts, the first hearing shall be had in the district in which the debtor has his domicile; and such petition may be amended by inserting an allegation of an act of bankruptcy committed at an earlier date than that first alleged, if such earlier act is charged in either of the other petitions; and in case of two or more petitions against the same firm in different courts, each having jurisdiction over the case, the petition first filed shall be first heard, and may be amended by the insertion of an allegation of an earlier act of bankruptcy than that first alleged, if such earlier act is charged in either of the other petitions; and in either case the proceedings upon the other petitions may be stayed until an adjudication is made upon the petition first heard; and the court which makes the first adjudication of bankruptcy shall retain jurisdiction over all proceedings therein until the same shall be closed. In case two or more petitions for adjudication of bankruptcy shall be filed in different districts by different members of the same copartnership for an adjudication of the bankruptcy of said copartnership, the court in which the petition is first filed, having jurisdiction, shall take and retain jurisdiction over all proceedings in such bankruptcy until the same shall be closed; and if such petitions shall be filed in the same district, action shall be first had upon the one first filed."

It is apparent that a case like the present was not in the actual contemplation of the persons who dictated the phraseology of this thirty-sixth section, and of the sixteenth general order, at the time such phraseology was adopted; and it must be conceded that strictly and literally construed, section thirty-six cannot be said to provide in express terms for taking upon the warrant to be issued against the bankrupt firm, any property except the joint stock and property of the copartnership, and the *separate estate* of *each* of the partners; or for the keeping of separate accounts of anything but the joint stock or property of the copartnership and of the *sepa-*

rate estate of each member thereof; or for the appropriation of the joint property of any two of the members of the firm of three partners who may constitute another and distinct firm, with a separate and distinct joint estate, and with separate and distinct copartnership debts, to the payment of the firm debts of such two copartners, in preference to the debts of the other firm of three partners, or the individual debts of the members of such copartnership.

But the express provisions of this section, as applicable to the estate and debts of a single firm, and the separate property and individual debts of the members of such firm, are only declaratory of the acknowledged principles of equity upon which the court would marshal the assets in the absence of such provisions; and this fact, as well as the general purpose and provisions, and the entire scope and policy of the bankrupt act, should be considered in determining the question presented in this case.

It is quite clear, under the eleventh, thirty-sixth and other sections of the bankrupt act, that when all the members of a firm petition for the benefit of the act, they are jointly and severally bound to make, in the proper schedules, the required statements of all their debts and creditors, whether such debts are copartnership or individual debts, or debts due by them jointly with other persons not parties to the petition; and also to set forth in their inventories their copartnership and individual property, and also property owned by either of them jointly with persons other than the partners who are joint petitioners. (Section eleven and form number two annexed to general orders.)

The discharge to be granted under a copartnership or individual petition is, in form and in law, a discharge from *all* the debts of the bankrupt or bankrupts, (except as specially excepted in the act), and it will hardly be claimed that a discharge properly granted to a bankrupt upon his separate petition, would not bar a debt against him for which he was jointly liable with another not a party to the proceeding. (Section thirty-two.)

By the fourteenth section of the act the assignment is to vest in the assignee "*all* the estate, real and personal, of the bankrupt," except, &c.; and, of course, all property owned by him as a tenant in common or partner with another would pass to the assignee. And other language in the same section shows that such property and all other rights and interests of the bankrupt, not excepted from the operation of the act, must pass to the assignee, subject of course to any legal or equitable liens which are irrevocably fixed thereon. The twenty-first section seems to contemplate that a bankrupt may be liable as maker, acceptor, drawer or endorser upon a bill of exchange, promissory note or other obligation as a member of two or more firms, carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, and when each firm are composed in whole or in part of the same individuals; and also seems to contemplate that the distinct estates of separate firms, composed in whole or in part of the same individuals, may be wound up in the same proceeding, and the assets of the different firms properly marshaled so as to be applied to the payment of the debts of the proper firm.

Upon the best consideration I have been able to give this case, I am of the opinion that under the proceedings in the southern district, the assignee then appointed has taken all the interests of Charles and Warren Leland in the firm property of Leland Brothers, which firm was *ipso facto* dissolved by their bankruptcy; that a discharge properly granted to Simeon, Charles and Warren Leland, in those proceedings, will be available to Charles and Warren Leland in respect to the indebtedness of the firm of Leland Brothers; that the creditors of the copartnership of Leland Brothers are entitled to a preference over other creditors of Warren and Charles Leland, or either of them, so far as the property and estate of Leland Brothers will pay the same; and that such preference will necessarily be secured to them under the proceedings against the three Lelands in the southern district. Under these conclusions I think it improper to proceed to an

adjudication in this case while such proceedings in the southern district are still pending.

In England it appears to be settled that a joint and separate commission in bankruptcy cannot subsist at the same time, and the bankruptcy court then exercises a discretion of superseding or suspending the separate commission, and permitting the estate to be administered under the joint commission, by which means it is said great expense is saved, and the joint effects disposed of to better advantage. Eden on Bankruptcy, 61. *Ex parte* Hardcastle, 1 Cox, 397. There are several American cases and authorities which seem to have some slight bearing upon the questions presented in this case, but I have not time to state them in detail. The case of *Ayer* v. *Brastow*, 5 Boston LawRep. 498, and cases there cited; the case of Abbe, 2 N. B. R. 26; Story on Partnership, section 313, and sections 374 to 409; the case of Beal, 2 N. B. R. 178, the case of Grady, 3 N. B. R. 54, and doubtless many others, may deserve a more careful and deliberate consideration than I am at present able to bestow upon them. See also Collier on Partnership, book 4, chapter 2, section 3.

It was strongly argued upon the agreement that there should be an adjudication in this case because the creditors of Leland Brothers could not participate in the selection of the assignee in the southern district, and that they should not be deprived of the right to participate in the choice of the assignee who is to administer such joint estate. So far as it is well founded, this objection, or a similar one, exists in every case of bankruptcy proceedings, by or against two or more persons as partners, where the members of the firm have separate estates and owe individual debts; for the separate creditors of the individual members of the firm, are in that case, excluded from any participation in the selection of an assignee by the express provisions of the bankrupt act; but although so excluded, they and the creditors of Leland Brothers in the case pending in New York, may apply for the removal of an improper assignee, and as the selection of an assignee is in all cases subject to the approval

of the district judge, creditors who cannot vote on the selection of the assignee, may nevertheless, on showing cause against it, prevent the confirmation of an improper selection, as well as apply after confirmation for the removal of an assignee. Besides the power of the court to appoint an additional assignee in all cases, enables it to protect the interests of the different classes of creditors whereon there is the slightest reason to suspect that an assignee chosen by the creditors or appointed by the register, will not regard with equal favor the rights of all the creditors of the bankrupt.—May 5, 1871.

L. B. PIKE, for petitioners.

GEORGE GORHAM, for Leland Brothers.

U. S. DISTRICT COURT—S. D. NEW YORK.

The United States district court in bankruptcy will not interfere with the possession of receivers appointed by the state courts to take charge of the property of a railroad, until their title is impeached for some cause for which it is impeachable under the bankrupt act; nor is it for the bankruptcy court, before such title is thus impeached, to interfere with the management or control of such railroads and other property by such state courts or by such receivers under the orders of such state courts.

Injunction heretofore granted in this case so far modified as to allow the receivers to enter upon the discharge of their duties and give the security required by the state court.

ALDEN v. *BOSTON, HARTFORD & ERIE R. R. CO.*

BLATCHFORD, J.—As the property in the hands of the receivers of the company must be regarded as being in the possession of the several state courts which appointed such receivers, and as such receivers were appointed and entered on their duties as such, and took possession of the railroads and other property of the company before these proceedings in bankruptcy were instituted, and as thus such state courts were in possession of such railroads and other property when these proceedings in bankruptcy were commenced, and have continued in possession of the same ever since, it is not for this court to interfere with such possession, at least until the

title of the receivers is impeached for some cause for which it is impeachable under the bankrupt act; nor is it for this court, before such title is thus impeached, to interfere with the management or control of such railroads and other property by such state courts or by such receivers under the orders of such state courts.

As to the discontinuance of the suit in New York, in which the receivers were appointed, if such discontinuance has the effect to revoke the appointment and authority of the receivers under the proceedings in that suit, then the injunction of this court does not restrain them from doing anything which they are doing by virtue of such appointment, and such injunction need not be vacated or modified. If the discontinuance of such suit does not render null any title which such receiver acquired through the proceedings in such suit, and they are still acting as receivers under the appointment made in the proceedings in such suit, they must be regarded as so acting on behalf of the court in which such suit was pending, and as its agents as to property in its custody, notwithstanding the suit is discontinued.

With these views, it is proper that the injunction heretofore issued herein on the third of January, eighteen hundred and seventy-one, be so far modified that the making and entering by the receivers into the contract, and the giving by them of the securities authorized by the decree of the supreme judicial court of Massachusetts, made on the twenty-third of December, eighteen hundred and seventy, shall not be deemed or taken to be a violation or contempt of such injunction, and that in all other respects such injunction be continued in force.

E. H. Owen, for the receivers. W. E. Curtis, for Alden. —February 13, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK.

A motion on the part of a creditor who is not a party to the petition, that the proceedings on the petitions for adjudication be dismissed, must be denied on the ground that the denials of bankruptcy by debtors are questions solely between the petitioning creditors and the debtors, with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtors, can be permitted to interfere.

In re BOSTON, HARTFORD & ERIE R. R. CO.

BLATCHFORD, J.—The motion on the part of Seth Adams, claiming to be a creditor of the above named debtors, that he may be allowed to defend in this court against petitions filed in this court by James Alden and the Adams Express Company who also claim to be creditors of said debtors, to have such debtors adjudged bankrupt is denied. If the debtors have any defence against such petitions, it is for them to make it out against the petitioning creditors. Mr. Adams can have no concern in the matter certainly before adjudication.

His motion that the proceedings on the said two petitions for adjudication in this court, and all proceedings in bankruptcy in this court in the matter of said debtors may be perpetually stayed, or that said petitions and proceedings may be dismissed, is also denied, without considering any of the merits discussed on the motion, on the ground that at this stage of the proceedings such a motion cannot be made by Mr. Adams. The questions at issue now on the petitions for adjudication in this court, and the denials of bankruptcy by the debtors, are questions solely between such petitioning creditors and the debtors, with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtors, can be permitted to interfere. No question of jurisdiction is involved. This court has full jurisdiction of the petitions for adjudication, notwithstanding anything alleged on these motions. If the debtors shall be adjudged bankrupt by any other court before they are adjudged bankrupt by this court, a different state of things and different questions will arise.

J. H. CHOATE, for the motions. C. A. KEVAN and W. E. CURTIS, opposed.—February 27, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK.

Where a corporation, holding property and carrying on business in three several states, is adjudicated bankrupt and assignees are appointed who are respectively citizens of two states in which proceedings in bankruptcy are pending, but none is appointed in the third state in which proceedings in bankruptcy are also pending,

Held, that as three assignees were to be chosen, and proceedings were pending in three different districts, it ought to have been so arranged that each of the districts could have an assignee within it a resident thereof. The court in the district in which no assignee has been selected, therefore declines to approve of the election of the assignee.

In re BOSTON, HARTFORD & ERIE R. R. CO.

I, Edgar Ketchum, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the proceedings, and was stated by the counsel for the opposing parties, to wit: DaCosta, who appeared for one creditor, and Mr. James H. Clark, who appeared for other creditors of the bankrupt.

The assignees chosen are residents respectively of the states of Massachusetts, Rhode Island and Connecticut, and not of the state of New York, or of the southern district of New York, and the fact that they have already been appointed assignees in proceedings in bankruptcy pending against the same bankrupt in the United states district courts in Massachusetts and Connecticut, respectively, is no reason why this objection should be disregarded; each of those courts having an asssignee or assignees within its own jurisdiction. So the former. The latter answering that nothing in the act forbids it, and that convenience may justify the allowance of it in this case.

In the opinion of the register, as three assignees were to be chosen, and proceedings were pending in three different districts of the United States, it ought to have been so arranged that each of the districts could have an assignee within it, a resident thereof. And in accordance with decisions upon the point already made, he considers the objection well taken. EDGAR KETCHUM, *Register*.

BLATCHFORD, J.—I concur in the views of the register, and decline to approve the election of assignees.—April 10, 1871.

U. S. CIRCUIT COURT—MASSACHUSETTS.

The United States district court has original jurisdiction in all matters and proceedings in bankruptcy. A petition for revision of a decree in the United States circuit court must be filed within ten days from the entry of the order or decree sought to be revised, unless the time, on good cause shown for the delay, is enlarged by special leave of the court.

A railroad is a commercial corporation, and hence subject to the provisions of the bankrupt act, and within the definition of the thirty-seventh section. The word business as applied to corporations has a broader meaning than the word commercial, but it was not the intention of congress to give such a scope to the word business as to supercede the words monied and commercial, and leave them without any practical signification.

Congress has power to enact that railroads created by a state shall be liable to the provisions of the United States bankrupt act, as it is settled by law that railways are private corporations, and a state, even by becoming a corporator, does not identify itself with the corporation.

ENOCH G. SWEATT, petitioner for revision, v. *THE BOSTON, HARTFORD AND ERIE RAILROAD CO. and SETH ADAMS, petitioning creditor.*

CLIFFORD, J.—Circuit courts within and for the districts where the proceedings in bankruptcy are pending, have a general superintendence and jurisdiction of all cases and questions arising under the bankrupt act "and, except when special provision is otherwise made, may, upon bill, petition or other proper process, of any party aggrieved, hear and determined the case as in a court of equity."—14 Statutes at Large, 518.

Evidently the revision contemplated by that clause is of a special and summary character, as sufficiently appears from the words "general superintendence" preceding and qualifying the word "jurisdiction," and more clearly from the fact that the power to revise, as conferred, extends to mere questions as well as to cases, and to every interlocutory order in the case pending the proceedings; and also from the language of the second clause of the section, that the powers and jurisdiction therein granted may be exercised either by said court, or by any justice thereof, in term time or vacation. *Morgan* v. *Thornhill*, 5. N. B. R. 1.

Proceedings in bankruptcy were instituted against the

Boston, Hartford and Erie Railroad Company in the district court for this district, on the twenty-first of October last past, on the petition of Seth Adams, one of the creditors of the company, and on the second day of March of the present year the company was adjudged bankrupt on said petition. Dissatisfied with the decree, the petitioner for revision, also one of the creditors of the company, on the eighteenth of the same month, filed the present petition in the circuit court praying the circuit court, among other things, to revise and reverse that decree. Power to revise "all cases and questions" which arise in the district court, under the bankrupt act, is conferred upon the circuit courts by the first clause of the second section of the act "except when special provision is otherwise made," as appears by the express words of the clause, and the further enactment is that the circuit courts in such cases may, upon bill, petition or other proper process of any party aggrieved, hear and determine the case or question in term time or vacation, as in a court of equity, showing that all congress intended by the phrase was to prescribe the rule of decision, whether it was made in court or at chambers.

Original jurisdiction in all matters and proceedings in bankruptcy, is conferred upon the district courts, and they are authorized to hear and adjudicate upon the same, according to the provisions of the bankrupt act. Pursuant to that authority the district courts may exercise original jurisdiction in all suits in equity as well as in suits at law, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against the assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, provided the suit shall be brought within two years from the time the cause of action accrued for or against such assignee. Three conditions must concur in order that the controversy may be cognizable under that clause of the section. It must have respect to some property or rights of property of the bankrupt, transferable to or vested in such

assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause, and against the other; but where they all concur and the suit has proceeded to final judgment or decree in the district court, the cause may be removed into the circuit court for re-examination by writ of error, if it was an action at law, or by an appeal if it was a suit in equity, provided the debt or damage amounts to more than five hundred dollars, and the proceedings to effect the removal of the cause are reasonable and correct.

Appeals under that clause are too late unless the appeal is claimed and the required notices are given within ten days from the entry of the decision or decree in the district court, and the act of Congress does not give the circuit court any power to enlarge the time. None of those provisions, however, apply to petitions for revision filed under the first clause of that section, nor does the bankrupt act fix any precise limitation to the right to file such a petition in the circuit court, unless it be that the right must be exercised before the proceedings in the district court are closed. Leave to apply for such a revision is granted by the act of congress; but the act does not prescribe any limitation as to the time within which the application must be made, nor do the rules and regulations promulgated by the supreme court ordain any limitation upon the subject. *Littlefield* v. *Delaware and Hudson Canal Co.* 4 N. B. R. 77; 14 Satutes at Large, 521.

Power to make rules for the orderly conducting business in court is vested in the circuit courts as well as in the supreme court, provided such rules are not repugnant to the laws of the United States and are not inconsistent with the rules relating to the same subject established by the supreme court. 1 Statutes at Large, 83; 5 *ibid*, 578. Experience though for a brief period showed that some regulation was necessary, and the court accordingly on the tenth of September, eighteen hundred and seventy, adopted the rule that such an application would not be entertained except by special leave of the court on good cause shown for delay, unless the aggrieved

party should give the required notice within ten days from the date of the order or decree described in the petition for revision.

Rendered as the decree in the district court was, more than ten days before the present petition was filed in the clerk's office of the circuit court, the first question for consideration is, whether the petition for revision is properly before the court. Petitions of the kind must be filed within ten days from the entry of the order or decree sought to be revised, unless the time on good cause shown for the delay is enlarged by special leave of the court. Seasonable application for such special leave was made to the presiding justice, but he could not hear it, as he was at the time attending to his official duties in the supreme court, nor could the circuit judge sit, as he, sitting in the absence of the district judge, rendered the decree described in the application. Necessarily postponed as the application was, it is certainly proper that the question as to the sufficiency of the cause shown for the delay in filing the petition should now be heard and determined. 16 Statutes at Large, 174. Good cause, it is conceded, may exist for such delay, and if such cause is shown in this case, the petitioner is entitled to be heard, but if not, then the petition for revision must be dismissed.

On the twenty-first of October the original petition was presented to the district court, representing that the railroad company had committed certain acts of bankruptcy, and praying that the company might be adjudged bankrupt, as provided in the thirty-ninth section of the bankrupt act. Due process was issued on the same day, returnable on the fourth of November following, and on the return day the company appeared and filed a motion to dismiss the petition for the want of jurisdiction. Both parties were subsequently heard upon that motion, and on the eighteenth of December last the district court, the circuit judge sitting in the absence of the district judge, overruled the motion and decided that the district court had jurisdiction of the petition. Such jurisdiction being still denied by the company, their counsel

on the twenty-third of the same month filed an application in the circuit court in the form of a bill in equity to obtain a revision and reversal of that decision under the power conferred by the first clause of the second section of the bankrupt act. Considerable delay ensued, but the petitioning creditor and the company, on the twenty-eight of February last, filed in the clerk's office of the circuit court an agreement in writing to withdraw the application for such revision, and on the second of March following, the corporation, by consent of the parties, was adjudged bankrupt by the district court. Notice of that adjudication, in the usual form, directed to the present petitioner, at Woonsocket in the State of Rhode Island, where he resides, was mailed at Boston on the tenth of the same month, and it is conceded that it was received by him at that place on the following day in due course of mail. He knew of the decision overruling the motion to dismiss the original petition, and he also knew that an application was filed in the circuit court to obtain a revision and reversal of that decision, but he did not know that the company had been adjudged bankrupt, nor had he any knowledge of the proceedings which led to it until he received that notice.

Proper steps were immediately taken to obtain a revision of that decree, but the application for the same was not seasonably filed in the clerk's office as required by the rule recently adopted by the circuit court in this district; but if the application had been filed as required it would not have expedited the hearing, as the circuit judge could not sit in the case and the presiding justice was sitting in the supreme court. Some weight should also be given to the fact that the rule limiting the time within which such applications must be made had never been promulgated in the district where the petitioner resides. Surprise, especially when occasioned by the act of the opposite party, is often a good excuse for a want of preparation, and it cannot be doubted that the agreement of the company to withdraw the pending application for a revision of that decree had that effect upon

the present petitioner. Withdrawn as the application was, without notice, the act of withdrawal must have operated as a surprise to all who were interested to obtain a different result. Viewed in the light of the attending circumstances, the court is of the opinion that the cause assigned for the delay in filing the application for revision in this case is sufficient, and that the petitioner is entitled to be heard upon the merits. *In re* Alexander, 3 N. B. R. 6; *Littlefield* v. *Del. & Hud. Canal Co.*, 4 N. B. R. 77.

Three principal errors are assigned by the petitioner in support of the pending application, as showing that the order and decree of the district court should be reversed. They are in substance and effect as follows:

1. That the provisions of the bankrupt act do not apply to the corporation adjudged bankrupt by that decree, as a railroad corporation is neither a monied, business, nor a commercial corporation within the meaning of those words as employed in the thirty-seventh section of the bankrupt act; and, therefore, that the district court had no jurisdiction of the case set forth in the original petition.

2. That it is not within the constitutional power of congress to enact that railroads, created by a state, shall be liable to the provisions of the bankrupt act, as such corporations are agencies and instrumentalities of the state for affording their citizens safe and convenient highways for public use and for the transportation of passengers and freight.

3. That the district court had no jurisdiction to adjudge the railroad corporation bankrupt in this case, because all the property and assets of the company had been previously transferred to receivers appointed under a decree passed by the supreme court of the state.

I. Congress has the power to establish uniform laws on the subject of bankruptcies, and having exercised that power the presumption is that it was rightly exercised, and that all persons and corporations whose pecuniary condition bring them within the provisions of the act are entitled to the

benefits which the act confers and are made subject to all its obligations and requirements. Moneyed, business and commercial corporations are certainly within the words of the act, as the thirty-seventh section enacts that the provisions of the act shall apply to such corporations, and to joint stock companies. Wherever the word person is used in the act, it must doubtless be construed as including corporations, as the forty-eighth section of the act so provides; but that section cannot be construed as including any corporation within the provisions of the bankrupt act, except such as are mentioned in the thirty-seventh section of the act, as the rules therein prescribed regulating the proceeding in such cases do not apply to any other corporations than those previously named in the same section. Corporations not therein described are not subject to the provisions of the bankrupt act, and it is equally clear that railroad corporations are not monied corporations nor joint stock companies within the special meaning of that section. Argument in support of that proposition is unnecessary, as both parties agree to its correctness. Conceded as the proposition is, it may be dismissed without further explanation or remark.

Jurisdiction is not claimed upon that ground, but the appellee insists that the word "commercial," as well as the word "business," preceding the word "corporations" in that clause of the section, includes railroad corporations, and that the legal effect of that clause, when properly construed, is to give the district courts the same jurisdiction in such proceedings against a railroad company as in case of other debtors. Whether the district courts have jurisdiction in such a case depends, in the first place, upon the terms of the bankrupt act, as they clearly cannot exercise any such power unless it is conferred by that act.

Power to establish uniform laws on the subject of bankruptcy throughout the United States is vested in congress, and the proposition is beyond doubt that it is as competent for congress to apply such laws to private corporations created by the states as to natural persons or to private cor-

porations created by authority of congress. Much discussion of that topic is unnecessary, as the proposition is conceded by the petitioner; but he insists that railroad corporations are not private corporations, and even if they are, he denies that they are included in the words employed by congress in the bankrupt act. Public corporations are towns, cities, counties, parishes and the like, which are created and continued for public purposes. Such institutions are the auxiliaries of the state in the important business of municipal rule, and have not the least pretension to sustain their privileges or their existence upon anything like a contract between them and the legislature, as their objects and duties are incompatible with everything of the nature of compact. *Bonaparte* v. *Railroad*, Bald. C. C. 222. Angel and Ames on Corp., sec. 31. *Bissel* v. *Jeffersonville*, 24 How. 287.

Municipal corporations are created by the authority of the legislature, and they are invested with subordinate legislative powers to be exercised for local purposes connected with the public, but all such powers are subject to the control of the legislature of the state. 2 Kent Com. (11th ed.) 275. Private corporations are created by the legislature for an infinite variety of purposes, and their powers are perhaps as various as the purposes they are designed to accomplish. Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit, but if the corporation is not created for the administration of political or municipal power, the corporation is private, unless the whole interest belongs to the government.

Banks created by the government solely for its own uses, and where the stock is exclusively owned by the government, are public corporations, but a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may become a partner in the association by sharing with the corporators in the stock; and chancellor Kent says that the same thing may be said of insurance, canal, bridge, turnpike and railroad companies. 2 Kent Com.

(11th ed.) 275. When government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. *United States Bank* v. *Planters' Bank*, 9 Wheat, 907. Text-writers every-where, in treating of the subject under consideration, class railroad companies with banks, insurance companies, canal and steamship companies, turnpike and bridge companies, and assume that all such are private corporations. 1 Redf. on Rail. (3d ed.) 53. "In all these cases the uses may, in a certain sense, be public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person." *Dart. Coll.* v. *Woodward*, 4 Wheat, 669.

Railways are created for the purpose of carrying passengers and freight, and they are everywhere regarded as common carriers when engaged in transporting merchandise and the baggage of their passengers. Steamships which carry freight and packages for all who apply are also responsible as common carriers. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him, from place to place or from one port to another. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full or the goods are of such a kind as to be liable to extraordinary danger, or such as he is not accustomed to convey. Such carriers, whether by land or by water, in the absence of any legislative provisions prescribing a different rule, are insurers and are liable in all events and for every loss or damage however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. The Lexington, 6 How. 381. The Cordes, 21 How. 23.

Steamship and steamboat companies, when incorporated and engaged in accomplishing the purpose for which they are created, and canal corporations not of a public character are undoubtedly commercial corporations within the meaning of

that phrase as employed in the bankrupt act, and as such are clearly subject to the provisions contained in the thirty-ninth section of the same act. Created as railways are for the same general purpose as the other corporations named, they are legally known by the same denomination and are properly included in the same classification. All such corporations transact immense amounts of business, and may perhaps, in view of that fact, be well enough called business corporations, but their true legal and constitutional denomination, in the opinion of the court, is that of commercial corporations, as they are enacted for the purpose of transporting passengers and freight, which is a commercial business, as it involves intercourse and an interchange of commodities. Commerce among the states, as well as foreign commerce, is subject to the regulation of congress, and it is well-settled law that the word commerce includes navigation as well as traffic, and that the power to regulate extends to the vehicles of intercourse as well as to the commodities to be exchanged. *Gibbons* v. *Ogden*, 9 Wheat, 189. Power to regulate commerce, including navigation and commercial intercourse, was one of the primary objects for which the constitution was adopted, and it is beyond every doubt that the power extends to commerce among the states as well as to foreign commerce. 2 Story on Const. (3d ed.) 4.

Regulations of the kind may or may not comprehend that commerce which is completely internal, and which does not extend to or affect other states, but the railroad in question and most others, are parts of connecting lines intended to promote commercial intercourse among several states. Such corporations, with their engines and cars, are certainly vehicles of commerce among the states, and as such are commercial corporations within the meaning of the bankrupt act, and are proper objects of regulation by congress under the grant to regulate commerce among the states. Pomeroy Constitutional Laws, 244. Even an incorporated bridge company, where it appeared that the bridge was a connecting link between two railroads, was held by the supreme court to

be a commercial corporation, and no doubt is entertained but that the decision was correct.—*Gilman* v. *Philadelphia*, 3 Wall. 729.

Comprehensive as the phrase, among the states is, it may nevertheless be restricted to that commerce which concerns more states than one, but where railroads incorporated in different states are connected in one continuous line of communication, they are clearly instruments of commerce within the meaning of the constitution, and as such are commercial corporations within the meaning of the bankrupt act, and are subject to congressional regulation. Recent decisions besides the one in this case, may be referred to, in which it is held that railroad corporations are business corporations, and as such that they are subject to be adjudged bankrupt as natural persons; but some difficulties attend that conclusion, as municipal corporations and others not liable to be dealt with under that act, transact vast amounts of business, as well as railroad corporations. *Alabama & Chattanooga R. R. Co.* v. *Jones*, 5. N. B. R. 97; *Rankin & Pullain* v. *The Florida, Atlantic and G. C. R. R. Co.* 1 N. B. R. 196.

Those cases and others of like character, proceed upon the ground that every corporation transacting business for gain as its chief and ultimate purpose is a business corporation, and as such that it falls within the provisions of the bankrupt act, and it may be admitted that every such corporation, in a general sense, is a business corporation. Serious difficulties, however, are involved in the other branch of the proposition, as monied corporations also transact business for gain, and it is the chief and ultimate purpose of their creation, but they are not business corporations within the meaning of the bankrupt act, as they are legally and properly known by a more distinctive and characteristic denomination. Vast amounts of business are also transacted by municipal corporations, but they are not business corporations in the sense of that law, because they are created for public purposes, and exercise by delegation a portion of the sovereign power of the state.

Religious, charitable, literary and educational corporations are not subject to the bankrupt act, nor are corporations created for political purposes, even though they, or some of them, may transact large amounts of business, as their chief and ultimate purpose shows that they are not properly denominated monied, business nor commercial corporations. Private corporations are of many kinds, and they are known by certain appellations according to the objects for which they are created. Known as they are by some denomination significant of their distinctive characteristics, indicating their chief and ultimate purpose, there will prove to be no great difficulty in determining whether they are or are not subject to the provisions of the bankrupt act. Incorporated banks, not of a public character, and insurance companies may be mentioned as examples of the monied corporations, described in the provisions under consideration. *Veazie Bank* v. *Fenno*, 8 Wall. 533.

Modern legislation is crowded with private charters creating business corporations in every branch of the industrial pursuits, and no doubt is entertained that all such are business corporations within the meaning of the bankrupt act, as expounded by all the courts. Corporations of a commercial character are also subject to the provisions of the bankrupt act, and no doubt is entertained that railroad corporations, as well as steamship, steamboat and canal corporations, if the subject of private ownership, are properly included in that classification. Direct authorities may be referred to, showing that a railroad corporation is a commercial corporation, and if that be shown, it must follow, beyond doubt, that such corporations are subject to the bankrupt act, as they fall, in that event, within the very words of the thirty-seventh section.

Joint-stock companies, by the Irish bankrupt and insolvent act, are made subject to its provisions, and the same act also provides that the words of the act shall include every company and body of persons associated for any banking or other commercial purpose, incorporated by statute or charter,

or which derives any immunity, privilege or power under any act of parliament, * * * and all commercial or trading companies or partnerships, etc. Authority is given to railways by the railway acts in that jurisdiction to borrow money, and a certain railway under that authority obtained certain loans, and gave mortgages to secure the payment, with interest, on a given day. Interest not having been paid, the creditor filed an affidavit of his debt in the court of bankruptcy for the purpose of having the corporation adjudged a bankrupt. Objection was made to the application upon the ground that railways were not commercial or trading companies, but the judge of the bankrupt court overruled the objection and sustained the application. Due appeal was taken to the court of appeal in chancery, where the parties were again fully heard, and on a subsequent day the opinion was given by the chancellor. He showed, in the first place, that railways were within all the other conditions of the bankrupt act, and then proceeded to say that the only question was whether a railway "is a company for commercial or trading purposes within the signification of those terms as used in the statute," and he held that it was, chiefly upon the ground that railways are "created for the purpose of conducting the business of carriers," remarking that, in general, they are common carriers and recognized as such, with all the liability attached to that character. *In re* Bagnalstown and Wexford Railway Co., 15 Irish Ch. R. 491; *Ex parte* Barber, De Gex B. R. 381.

Reported cases, decided by the supreme court, confirm that construction and show to a demonstration that the transportation of passengers and freight from one state to another or through more than one state, whether by land or water, is commerce within the meaning of that provision of the constitution which gives to congress the power to regulate commerce among the several states. Express power to regulate commerce among the several states, is given to congress, and the words of the grant comprehend every species of commercial intercourse, and the power is complete in

itself and may be exercised to its utmost extent without limitations other than such as are prescribed in the constitution. *Gibbons* v. *Ogden*, 9 Wheat, 193; *Brown* v. *Maryland*, 12 Wheat. 445; *United States* v. *Coombs*, 12. Pet. 78; *Clinton Bridge*, 10 Wall. 462; same case, 16 Am. L. Reg. N. S. 149; *Erie Railway* v. *State*, 31 N. J. 531.

Confessedly, railroad corporations are created to transport passengers and freight, and it is that precise business in which they are employed. They must, therefore, be held to be commercial corporations. Undoubtedly the word business, as applied to corporations, has a broader meaning than the word commercial, as used in the same clause, but it was not the intention of congress, in the opinion of the court, to give such a scope to the word business as to supersede the words monied and commercial, and leave them without any practical signification. *Harris* v. *Avery*, Law Rep. 1 C. P. 154.

II. Sufficient has already been remarked to show that railroad corporations are not public corporations, but the petitioner for revision insists that a recent decision of this court as affirmed by the supreme court, supports the theory which he assumes in his second proposition. *Buffington* v. *Day*, 4 Cliff.; same case, 11 Wall. 113. Taxes, in that case were assessed against the plaintiff, under the internal revenue laws, upon his salary as judge of probate and insolvency for the county of Barnstable, in this state, and having paid the same under protest, he brought an action of assumpsit against the collector to recover back the amount, and the court held that it was not competent for congress to impose such a tax upon the salary of a judicial officer of a state. State power to lay and collect taxes for the support of their government may reach every subject over which the sovereign power of the state extends. They cannot, however, tax imports nor exports without the consent of congress, as they are prohibited from so doing by the constitution; and the power does not extend to the instruments of the federal government nor to the constitutional means employed by

congress to carry into execution the powers delegated to that government, by the constitution. Congress may lay and collect taxes, duties, inposts and excises to pay the debts and provide for the common defence and general welfare; but that grant of power, when properly construed, does not interfere with the power of the states to levy taxes for the support of their own governments, nor does it extend to the means and instruments of the states any more than the power of the states to levy taxes for the support of their governments can be held to extend to the means and instruments of the government of the United States.

Founded as these principles are in the nature of the government ordained by the constitution and in the relation which the states and the United States sustain to each other under that paramount law, they are immutable, and they are expounded and illustrated by a series of the decisions of the supreme court, never surpassed in ability, wisdom and logical power by any ever delivered from the bench of any judicial tribunal. Examined separately or as a whole, they show on the one side that the federal government, though limited in its powers, is supreme within its sphere of action; that its laws, when passed in pursuance of the constitution, form the supreme law of the land. On the other hand, they also show that the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people; that the exclusive powers possessed by the United States cannot be exercised by the federal government, and that the United States and the states in those respects, though exercising jurisdiction within the same territorial limits, are separate and independent sovereignties, acting separately and independently of each other within their respective spheres, just as fully "as if the line of division was traced by landmarks and monuments visible to the eye." *McCulloch* v. *Maryland*, 4 Wheat. 406; *Gibbons* v. *Ogden*, 9 Wheat. 204; *Osborn* v. *Bank*, 9 Wheat. 859; *Brown* v. *Maryland*, 12 Wheat. 448, 458; *Weston* v. *Charleston*, 2 Pet. 448; *Dobbins* v. *Commissioners*, 16

Pet. 447; *The Collector* v. *Day*, 11 Wall. 124; *National Bank* v. *Com.* 9 Wall. 361.

What those cases decide, as applied to the present case, is that the states cannot tax the means or instruments of the United States, nor can congress tax the means or instruments of the state governments. By the word "means" is meant the revenue, taxes and public securities, as applied both to the United States and the several states, and the prohibition extends to the salaries of the executive and judicial officers and to the compensation of senators, members of congress, and to that of members of the state legislatures. Officers whose compensation is derived from fees paid by those transacting business with the office stand upon a different footing, but the question whether such compensations fall within the reciprocal exemption is not involved in this case. Even less difficulty is felt in giving examples of what is meant by the instruments of government, as that phrase is used in decided cases. *Austin* v. *Aldermen*, 7 Wall. 699. *Hamilton Co.* v. *Massachusetts*, 6 Wall. 639. *Society for Savings* v. *Coit*, 6 *ibid* 604.

Instruments of government such as are referred to, are the officers, as such, executive, legislative and judicial, appointed or chosen to enact, execute and expound the laws, and the public buildings erected and occupied for the uses of the government. Federal machinery is much more multifarious than that of the states, as the government of the United States is charged with the national defence, and of course our forts, navy-yards, public ships and the like fall within the exemption. Public corporations also fall within that exemption, but railways are private corporations, just as much as steamship and steamboat companies or canal corporations, where the stock belongs to the corporators, or as much as monied, manufacturing or business corporations, all of which are created to promote the public good. Doubtless, some such corporations are more convenient and useful than others; but the question before the court is not affected by the degree of importance which attaches to the corpora-

tion. Private corporations are not instruments of the state governments, and it is settled law that railways are private corporations, as appears by many decisions of the highest character. *Dart. Coll.* v. *Woodward*, 4 Wheat. 669. State governments sometimes become partners in such corporations, but the state does not, by becoming a corporator, identify itself with the corporation. Instead of that the state, in such a case, devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. *U. S. Bank* v. *Planter's Bank*, 9 Wheat. 907; *Union Pacific Railroad* v. *Lincoln County*, 10 Am. Law. Reg. N. S. 461.

Apart from that proposition of the petitioner, the authority of congress to subject railroad corporations to the provisions of the bankrupt act is also denied, because it is insisted that such a corporation cannot, without distinct legislative authority, make any alienation, absolute or conditional, either of the general franchise to be a corporation or of the subordinate franchise to manage and carry on its corporate business. Suppose it to be correct that a railroad corporation may not by its own act alienate any of its franchises, either the franchise to exist as such, or the franchise to accomplish the objects for which it was created, still it is conceded that it may transfer the same if so authorized by the state, and it is difficult to see, if the corporation is a private corporation, why the necessary power to enable the district court or the register, as the case may be, to make the transfer, may not be conferred by congress, as it is conceded that the exclusive power to establish a uniform system of bankruptcy is vested in the national legislature. 14 Stat. at Large, 522.

Express power is given to congress to establish such a law, and the constitution also provides that congress may "make all laws which shall be necessary and proper for carrying into execution the foregoing powers," and it is clear that one of the powers previously granted is the power to pass such a law. Pursuant to that power, congress has, in effect, provided that the commercial corporations shall be subject

to the bankrupt act, and that all the provisions of the act applicable to the debtor, or which set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning or paying away his money or property, shall in like manner and with like force, effect and penalties, apply to each and every officer of such corporation or company in relation to the same matter concerning the corporation or company and their money and property. Prior to that clause, the same section enacts that "like proceedings shall be had and taken" as are provided in the case of debtors, and the section concludes with the enactment that all property and assets of the corporation shall be distributed to the creditors of such corporations in the manner provided in this act in respect to natural persons."

More satisfactory regulations for administering the bankrupt act than are found in the existing law could not well be framed; and the court, having come to the conclusion that such a corporation is a private corporation, is entirely satisfied that the section of the act which provides that the act shall apply to such a corporation is a valid law. But suppose that the franchise to be a corporation, unless assignable by the laws of the state, is not transmissible under the bankrupt act, still it is unquestionably true, as was held by the district court in this case, that the franchise to build, own and manage a railroad and all the property of the company are alienable and subject to sale and transfer under the laws of the state which created the corporation. *Hall* v. *Sullivan Railroad*, 21 Law Rep. 140. *Union Pacific Railroad* v. *Lincoln County*, 10 Am. Law Reg. N. S. 464. Much discussion, however, of that point is unnecessary, as the court here concurs entirely upon that topic with the views expressed by the circuit judge in disposing of the case in the district court, *Adams* v. *Railroad Co.*, 4 N. B. R. 99.

III. Extended argument to show that the third proposition of the petitioner cannot be sustained is unnecessary, as the theory of fact assumed in the proposition is erroneous, as

appears by the evidence exhibited at the hearing. All the property and assets of the company had not been previously transferred to receivers appointed under a decree passed by the supreme court of the state, which is all that need be said upon the subject.

Petition for revision denied.

JOSHUA P. CONVERSE, and EDWARD A. KELLEY for Sweatt.

BENJ. F. BUTLER, CHARLES S. BRADLEY, WILLIAM G. RUSSELL, T. K. LOTHROP and R. R. BISHOP for Adams.

SUPREME COURT—PENNSYLVANIA.

Section second of the present United States bankrupt act does not preclude a state court from jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. It is within the power of congress in establishing a uniform system of bankruptcy to provide a uniform rule on the subject of the limitations of actions, which rule must of necessity supersede all state legislation on the subject.

PEIPER v. *HARMER.*

Demurrer to plea of the statute of limitations to the third count of the declaration.

SHARSWOOD, J.—There is nothing in the second section of the act of congress of March second, eighteen hundred and sixty-seven, entitled "an act to establish a uniform system of bankruptcy throughout the United States," which precludes a state court from jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. That the federal courts are vested with such jurisdiction does not make it exclusive. The same provision almost *totedem verbis* is to be found in the eighth section of the bankrupt act of August nineteenth, eighteen hundred and forty-one, 5 Story, Laws U. S. 2835; and under that act it was held by the supreme court of Massachusetts, in *Ward* v. *Jenkins*, 10 Met. 583, that

the state court nevertheless had jurisdiction. I have carefully read the opinion in that case, and refer to it here for the grounds of my judgment on this point.

But in regard to the plea of the statute of limitation it seems to me that it was entirely within the power of congress in establishing a uniform system of bankruptcy, to provide a uniform rule on the subject of the limitation of actions, whether by or against an assignee in bankruptcy, and such rule must of necessity supersede all state legislation on the subject. If the right of action asserted by the assignee is not actually barred at the time of his appointment—a case expressly saved by the proviso—he has two years, and only two years from the time the cause of action accrued, for or against such assignee. This is to apply by the express words of the section to actions brought "in any court whatsoever" therefore in any court, state or federal. If the meaning of the act is that the cause of action accrued to or against the assignee at the time of his appointment, as to which it is not necessary that I should here express any opinion, then the effect may be in some cases to prolong, and in others to shorten the period of limitation given by state laws. Thus, if the six years allowed in most actions should be near expiring when the assignee is appointed, then the time would be extended; if it should only have begun to run, it will be very much shortened. I can understand very well the policy of such a provision as one means of bringing bankrupt estates in the hands of the assignees to a speedy settlement and conclusion.

Judgment for the defendant on the demurrer to the plea of the statute of limitations to the third count.

U. S. DISTRICT COURT—S. D. NEW YORK.

Upon the application of a landlord for an allowance of rent for the time during which his premises were occupied by the goods of the bankrupt while in the hands of the marshal, the court held that the landlord ought to have applied to the court for possession, immediately after the marshal took control, and that it would have ordered a removal of the goods and furniture therefrom and the premises vacated.

If the landlord had an opportunity to rent the premises, he should have so represented to the court. Application for payment of rent refused.

In re McGRATH and HUNT.

I, the undersigned register, to whom this case is referred, respectfully certify and report that a claim of Joseph Lee against the said estate has been submitted to me by the respective parties. Upon an application of the said Lee for an order that a reasonable sum be allowed him from said fund for rent of the premises owned by him and heretofore let to and occupied by said bankrupts up to the time of their bankruptcy, to wit: the premises numbered sixty-four and sixty-six Lispenard street, in this city, at a rent of five thousand five hundred dollars per annum. After the bankruptcy, on the fifteenth of October, eighteen hundred and seventy, the marshal took possession of the goods and premises in question, and held them until the fifteenth of December following, when he surrendered to the assignee. It is very clear from the testimony, that the landlord is entitled to rent at and after the rate of three thousand dollars a year, that being the sum at which he could have rented it during these two months during the period the marshal so held it, which rent amounts to about five hundred dollars. I cannot think, under the subjoined testimony, that the estate is liable for that sum.

The assignee was present in person and stated that he could not change the facts as sworn to by Mr. Lee, and it was submitted to my decision by both parties.

I am unwilling to make the decision indicated above without first submitting the case to the court for instructions

as I may do under the decision of judge Cadwalader, in the case of Benjamin Sherwood, 1 N. B. R. 75. If the court think my views above expressed are correct, I shall deny the application of the landlord and leave him to his remedy at law.

I. T. WILLIAMS, *Register.*

BLATCHFORD, J.—The register is correct in his conclusion. On the testimony, the landlord ought to have applied to this court immediately after the marshal took possession of the goods and premises, to have the goods and furniture removed, and the premises vacated by the marshal. Such motion would have been granted.

If he had an opportunity to rent the premises, he should have so represented to this court.—June 3, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK.

Where a creditor who has ample security for his claim makes proof of the same, without mentioning the security, through inadvertence and ignorance of the law, an order will be entered granting to the said creditor leave to withdraw his proof and restoring to him his rights as though no proof had been filed.

In re CLARK and BININGER.

The undersigned register to whom the above entitled case is referred, respectfully reports and certifies to this honorable court:

That John Byrne, by his attorney in fact, on the seventeenth day of January, eighteen hundred and seventy, made proof in due form of law, before me, of his claim against the estate of said bankrupts for the sum of six thousand seven hundred dollars, without making any reference to any security held therefor. That afterwards and on the thirtieth of March, eighteen hundred and seventy-one,

the said John Byrne filed his petition before me which is hereto annexed, from which it appears that he has ample security for his claim, and that the proving thereof was made and filed through inadvertence or ignorance of his attorney of the fact that any security was held therefor, praying for leave to withdraw his said proof, and that he be restored to his rights in all things as if no such proof had been made or filed.

That notice of the filing of said petition was given to the assignee in these proceedings who thereupon appeared before me and objected to the granting of the prayer of the said petition, on the ground that the said security had been by the making and filing of the said proof waived, and that the estate had thereby assumed rights which he did not feel at liberty to relinquish.

Whereupon I hereby certify the issue so framed to this court for decision. And I further certify and report that I am perfectly satisfied that the said proof was made and filed solely through inadvertence and in ignorance of the law, or of the facts of the case on the part of the said attorney who made the same, and that the said petitioner, had he known the facts and law, would not have made or filed the said proof.

Wherefore I recommend to this honorable court that an order be entered giving leave to said petitioner to withdraw his said proof, and that he be in all things restored to his rights as though no proof of claim had been made or filed.

I. T. WILLIAMS, *Register.*

BLATCHFORD, J.—An order to the effect recommended by the register should be entered.—April 25, 1871.

UNITED STATES CIRCUIT COURT—MAINE.

(May Term 1871.—In Equity.)

The United States bankrupt act now in force, confers jurisdiction in equity upon the district courts in certain cases, and appeals may be taken from the district to the circuit courts in all such cases where the debt or damages claimed amounts to more than five hundred dollars, provided the appellant complies with the conditions specified in the eighth section of the act.

A mortgage given to secure the payment of two promissory notes, the consideration of which being pre-existing debts of the bankrupt, for almost all of which the mortgagees were liable either as sureties or endorsers, is void when it appears that it was made within four months next preceding the filing of the petition in bankruptcy, for the express purpose of giving a preference; that the mortgagors were insolvent and the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time of the execution of the mortgage, and that the conveyance was made in fraud of the provisions of said act.

SCAMMON, Assignee v. *COLE, et al.* *

CLIFFORD, J.—Jurisdiction in equity is conferred upon the district courts in certain cases, by the act of congress establishing a uniform system of bankruptcy, and the eighth section of the act provides that appeals may be taken from the district to the circuit courts in all such cases where the debt or damages claimed amount to more than five hundred dollars, provided the appeal is claimed within ten days after the entry of the decree, and the appellant complies with the other conditions specified in that section.

On the eleventh of July, eighteen hundred and sixty-eight, a creditor of the firm of Chadbourne & Nowell, of Biddeford, in this district, filed in the office of the clerk of the district court, a petition in bankruptcy against said firm, and on the second of December following they were adjudicated bankrupts. Pursuant to that decree the appellee was appointed assignee of the estate of the bankrupts, and the complainant alleges that a conveyance of all their property was made to him as such assignee by the register in bankruptcy having charge of the case; that the debtors, on the seventeenth of June of the same year, and within four months

* See 3 N. B. R. 100.

before the filing of the said petition, being insolvent or in contemplation of insolvency, made a conveyance to the appellants of the personal property described in the bill of complaint, with a view to give to the grantees a preference as creditors of their firm, they, the said appellants, having reasonable cause to believe that the grantors were insolvent, and that such conveyance was made in fraud of the provisions of the bankrupt act. Possession by the appellants of the property conveyed, and demand of the same by the assignee, and their refusal to deliver the same are also alleged by the complainant, and he prays that the respondents may be summoned to appear and answer the complaint, and show cause, if any they have, why the property or the proceeds thereof should not be adjudged the property of the bankrupts, at the time the said petition was filed, and that the same should be delivered to the complainant as such assignee. Service was duly made and the respondents appeared and filed separate answers. They severally admit that the bankrupts at the time alleged, made a mortgage to them of the goods and chattels specified in the bill of complaint, but they allege that it was given for a present consideration, and explicitly deny that the mortgagors, at the time the instrument was executed, had any knowledge that they or either of them were insolvent, and they also deny that the debtors gave the mortgage, or that they, the respondents, took the same with any view to give or to secure to them any preference as creditors of the bankrupts, or to prevent their property from being duly distributed under the bankrupt act. Proofs were taken and the cause was heard and a decree entered that the conveyance made by the bankrupts to the appellants was illegal, fraudulent and void, and that the cause be referred to a master to take an account of the property received by the respondents. Due report was made by the master, specifying the property received by the respondents under the mortgage, and the net proceeds of such portion of the same as they had sold and appropriated to their own use. Such of the property as remained in their possession they

were required by the final decree to deliver to the complainant, and that he also recover of them for such portion of the property as they had sold, the sum of nine hundred and fifty-six dollars and twelve cents, together with the costs of suit. Appeal was duly taken by the respondents to this court, and the parties during the last term were fully heard upon the merits of the controversy. Certain exceptions were taken to the master's report, but those objections were not pressed at the argument and therefore will not be reconsidered.

Preferences, as well as fraudulent conveyances, if made within four months before the filing of the petition by or against the bankrupt, are, under certain conditions, declared void by the thirty-fifth section of the bankrupt act; those conditions, so far as they are applicable to this case, are as follows: "That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefitted thereby, * * * having reasonable cause to believe such person is insolvent, and that such * payment, pledge, assignment or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefitted."

Three things must appear in order that the transaction may fall within that provision and be affected by it, as alleged in the bill of complaint.

1. That the payment, pledge, assignment, transfer or conveyance was made within four months before the filing of the petition by or against the bankrupt, and with a view to give a preference to some one of his creditors, or to a person

having a claim against him or who was under some liability on his account.

2. That the person making the payment, pledge, assignment, transfer or conveyance, was insolvent or in contemplation of insolvency at the time the preference was given or secured.

3. That the person receiving such payment, pledge, assignment or conveyance, or to be benefitted thereby, had reasonable cause to believe that the person making the same and giving or securing such preference, was insolvent, and that the payment, pledge, assignment, transfer or conveyance, was made in fraud of the provisions of the bankrupt act.

All of these matters are fully alleged in the bill of complaint, but they are distinctly denied in the answers, so that the complainant takes the burden of proof in the first instance. Much discussion of the first requirement to maintain the bill of complaint is unnecessary, as the record shows that the mortgage in question was made to give a preference to the mortgagees, and was executed by the bankrupts only twenty-five days before the petition in bankruptcy was filed in the district court. By the terms of the mortgage it appears that it was given to secure two promissory notes, signed by the mortgagors, of even date with the mortgage, one given to the first named appellant for the sum of twelve hundred and seventy-two dollars and fifty cents, and the other to the other appellant for the sum of fifteen hundred and forty-seven dollars and sixty-one cents, both payable on demand with interest. Both notes were given for pre-existing debts of the bankrupts, for all of which the appellants were liable, either as sureties or endorsers, except a small sum due to one of the mortgagees.

Prior to the decree in bankruptcy, the mortgagors were engaged in buying and selling furniture, and the proofs show that they were largely indebted, and that the mortgage covered all their personal property, except one horse, not subject to attachment by the laws of the state; and that the senior

partner of the firm, as a part of the same transaction, mortgaged to the appellants all his real estate, to secure the payment of the same two notes. Neither the firm nor the other partner appears to have owned any real estate, so that the two mortgages covered all of their attachable property whether belonging to the firm or to them as individuals.

Fraudulent preference is the *gravamen* of the charge, and the complainant, as the assignee of the estate of the bankrupts, prays that the respondents may be required to answer the complaint, that the mortgage of the personal property may be set aside, and that the property therein described may be adjudged the property of the bankrupts at the time the petition was filed.

I. Made as the mortgage was, within four months next preceding the filing of the petition in bankruptcy, and for the express purpose of giving a preference to the appellants as the creditors of the mortgagors, the first material allegation of the bill of complaint is established.

II. Were the mortgagors insolvent or in contemplation of insolvency at the time the mortgage was executed, is the next material inquiry arising in the case as presented in the pleadings. Beyond doubt they owed debts greatly exceeding the value of all their property, and they mortgaged it all to the appellants to secure less than one-third part of their indebtedness. Literally estimated, their whole property did not exceed in value the sum of six thousand seven hundred dollars, and they had mortgaged it all, including their stock in trade, to secure the two notes described in the mortgage deed, giving the mortgagees of the personal property the right to enter and take possession of the same at any time whenever they should see fit. They owed not less than eleven thousand dollars as appears by the record, and it is not pretended that any portion of the same other than what was adjusted between the parties to the mortgage and was included in those two notes, is secured in any manner. All sums due to the appellants, or for which they were liable as sureties or otherwise, on account of the mortgagors, were in-

cluded in the mortgage, but no provision was made for the other creditors or for any portion of their indebtedness, except what is included in the mortgage; whether the mortgagors knew it or not, it is clear to a demonstration that they were actually insolvent at that time, and it would be difficult, if not impossible, in view of the proofs, to hold that they were ignorant of the fact, as they had several times been obliged to procure renewals and extentions, and some of their paper was still overdue, and the testimony of the first named appellant shows that the senior member of the firm told him when the mortgage was given, or the day before, that they had notes in the bank which were overdue and others coming due which they desired to arrange, adding that the notes "bothered" them, as it took much time to attend to them when they ought to be at work. Viewed in the light of the proofs in the case, as more fully set forth in the record, it is so clearly shown that the mortgagors were insolvent at the time the mortgage was executed, that it does not seem necessary to pursue the inquiry.

III. Two enquiries of fact are involved in the third condition specified in the clause of the section under consideration. 1. Whether the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time they executed the mortgage to the appellants. 2. Whether they had reasonable cause, at that time, to believe that the mortgage was made in fraud of the provisions of the bankrupt act. Separate answers were filed by the respondents, and they respectively denied that at the time of the making of the mortgage, they believed or had any reasonable cause to believe that the mortgagors were insolvent or "in contemplation of insolvency," as alleged in the bill of complaint.

1. Proof that the respondents had actual knowledge that the mortgagors were insolvent at that time is not required in order to maintain the bill of complaint, but the allegation in that behalf is sustained if it appears that the mortgagees had reasonable cause for such belief, as that is the language of the thirty-fifth section of the bankrupt act. Actual knowledge

is not made the criterion of proof in this matter, nor is it necessary that it should appear that the respondents actually believed that the mortgagors were insolvent, but the true inquiry is, whether the appellants, as business men, acting with ordinary prudence, sagacity and discretion, had reasonable cause to believe that the debtors were insolvent in view of all the facts and circumstances known to them at the time they received the transfer of the property. *Colburn* v. *Proctor et al.*, 15 Gray, 38.

Such a party cannot be said to have reasonable cause to believe that his grantor or mortgagor is insolvent unless such was the fact, but if it appears that the party making the conveyance was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the party receiving the conveyance as clearly put the assignee, transferee or grantee of the property upon inquiry, it would seem to be just to hold that the party receiving the assignment, transfer or conveyance, even if he omitted to make inquiries, had reasonable cause to believe that his assignor or grantor was insolvent. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when *put upon inquiry*, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Hill* v. *Simpson*, 7 Ves. 170; *Kennedy* v. *Green*, 3 Myl. & Keen, 722; *Smith* v. *Lowe*, 1 Atk. 489; 3 Sug. on V. and P. 471; *Jones* v. *Smith*, 1 Hare 43; *Pringle* v. *Phillips*, 5 Sand. S. C. 157; *Booth* v. *Barnum*, 9 Conn. 286; *Pitney* v. *Leonard*, 1 Paige Ch. 461; *Carr* v. *Hilton*, 1 Curt. C. C. 390.

Constructive notice of the kind mentioned is held sufficient in many cases, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Whatever fairly puts a party upon inquiry is sufficient notice in equity where the means of knowledge are at hand, and if the party under such circumstances omits to inquire, and

proceeds to receive the transfer or conveyance, he does so at his peril, as he is then chargeable with a knowledge of all the facts which, by a proper inquiry, he might have ascertained. *Hawley* v. *Cramer*, 4 Cow. 717; *Williamson* v. *Brown*, 20 Law Rep. 397.

Apply that rule to the proofs in the record, and it is too clear for argument that the finding of the district court under this issue was correct, as fully appears from the evidence to which reference has already been made in examining the preceding proposition. Sufficient information might easily have been obtained, as a large amount of the paper of the bankrupts was in the bank where one of the appellants was a director. Suppose, however, that the rule of constructive notice is not applicable in the case, still it is quite obvious that the same conclusion must be reached, even if the proper rule of decision is the one ordinarily applicable in equity suits. Where the facts charged in the bill as the grounds of obtaining relief are clearly and positively denied in the answer, and are only supported by one witness, the rule is well settled in equity as administered in the federal courts, that the court will not decree in favor of the complainant. *Union Bank* v. *Geary*, 5 Pet. 111; *Delano* v. *Winsor et al.*, 1 Cliff. 505; *Parker et al.*, v. *Phetteplace*, 2 Cliff. 79

Such an answer is evidence in favor of the respondent, and unless it is disproved by something more than the testimony of one witness, it is conclusive. *Clark's executors* v. *Van Riemsdyk*, 9 Cran. 160; *Hughes* v. *Blake*, 6 Wheat. 468; *Daniel* v. *Mitchel et al.*, 1 Story 188.

Congress, however, may prescribe a different rule in such litigations, and congress has provided to the effect that if all the other conditions specified in the section concur, and it appears that the person who received the pledge, assignment, transfer or conveyance, had reasonable cause to believe that the person from whom he received it was insolvent, that the assignee of the bankrupt's estate, under those circumstances, may recover back the property or its value as already more fully explained. 14 Stat. at Large 534.

Different causes of action will doubtless require different forms of remedy, but the section under consideration contains no intimation that the rule of evidence is any more stringent in a suit in equity than in an action at law, but the language of the section applicable in all cases, is to the effect that it must appear that the party making the pledge, assignment, transfer or conveyance was insolvent at the time the same was made, and that the party receiving it had reasonable cause to believe that such was the fact. Actual knowledge of a given fact may be proved by circumstances, even in an ordinary equity suit, where from the nature of the pleadings, the testimony of a single witness, without corroboration, would not be sufficient, and it is equally clear that circumstances may be sufficient to show that the transferee, mortgagee or grantee of the property of an insolvent person had reasonable cause to believe that he was insolvent at the time of the transfer, mortgage or conveyance was made. Willing ignorance, as where a party wilfully shuts his eyes to the means of information which he knows are at hand, is regarded in many cases as equivalent to actual knowledge, and it is difficult to see why that rule should not be applied in the case before the court. *May* v. *Chapman*, 16 Mees. and Wels. 355; *Goodman* v. *Simonds*, 20 How. 343; The *Lulee*, 10 Wall. 202.

Concede, however, that by the true construction of the provision, the rule of constructive notice does not apply in such a case; that such an assignee, transferee, mortgagee or grantee is not obliged to make any investigation, that the only proper inquiry in the case is whether the party receiving the transfer, mortgage or conveyance, in view of the attending circumstances and of all the facts known to him concerning the business and pecuniary condition of the party making the transfer, mortgage or conveyance, had reasonable cause to believe that the other party to the instrument of transfer, mortgage or conveyance was insolvent at the time the same was made, still the same conclusion must follow, as it appears to the entire satisfaction of the circuit court that

the appellants, as reasonable men, acting with ordinary prudence, sagacity and discretion "had good ground to believe" that the debtors were insolvent when they received the mortgage. Support to that conclusion is found in the testimony of the appellants as well as in that of the first named mortgagor, and it is confirmed to the entire satisfaction of the court by the circumstances attending the execution of the mortgage.

Extended comments upon the evidence are unnecessary in this court, as the question was very fully examined in the opinion of the district judge, where all or nearly all of the material portions of the evidence are reproduced. Suffice it to say, the entire available means of the mortgagors did not exceed six thousand seven hundred dollars, and their debts, including the two notes secured by the mortgages, did not fall short of eleven thousand dollars, showing beyond all doubt that they were deeply insolvent. Their paper, on which the appellants were liable to the amount of twelve hundred and fifty dollars, was then overdue and unpaid, as is fully proved. Money which they had borrowed to a large amount was due to other parties, the payment of which might be demanded at any moment. Extensions had several times been granted to them, but the evidence shows that forbearance did not enable them to meet their liabilities, and it is doubtless true that these embarrassments prevented them at times from attending to their regular business. Recent extensions were obtained on liabilities where the appellants were not sureties, and the mortgagors owed other creditors whose demands were overdue and for which no provision was made.

Many of these facts were known to the appellants or became known to them during the negotiations which preceded the transaction in question, and they also knew that all of their own claims and indebtedness were secured by the mortgage, and that the mortgagors had no other property to secure what they owed to their other creditors. Obviously, the effect of the transaction was to give ample security to the appellants and to withdraw from every other creditor

of the mortgagors all means of securing their demands, except by attaching the mortgaged property. Evidence of intended preference is disclosed in every feature of the transaction, and the circumstances, taken as a whole, are persuasive and convincing that the appellants had reasonable cause to believe that the mortgagors were actually insolvent.

Inquiries were made by the appellants, how much money the mortgagors desired to raise and what debts they proposed to pay or to secure, and the whole purpose of the applicants in desiring to mortgage their property was pretty fully explained. They also inquired how much they owed in Boston, and were told that the amount did not exceed fifteen hundred or two thousand dollars, but the necessity or propriety of securing any other creditors than the appellants was not even made the subject of conversation. Sustained as the charge is by all the circumstances in the case, the conclusion of the court is that the allegations of the answer are disproved, and that the appellants did have reasonable cause of belief as is alleged in the bill of complaint.

2. Suppose that is so, still the complainant is not entitled to an affirmance of the decree unless it also appears that the mortgage was made in fraud of the provisions of the bankrupt act, which is the only other disputed fact to be examined in the case. Before entering into any examination of the proofs exhibited in the record, it becomes necessary to inquire and determine whether the rule of evidence prescribed in the thirty-fifth section of the bankrupt act, applies to cases arising under the first clause of the section, or whether its application is confined exclusively to those arising under the second, which is the six month's clause, declaring certain sales, assignments, transfers or other conveyances void if made within that period.

Whenever any person being insolvent or in contemplation of insolvency within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to

believe him to be insolvent or to be acting in contemplation of insolvency, and that such payment, sale, assignment or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation or effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the provision is that "the assignee may recover the property or the value thereof, as assets of the bankrupt." Those two clauses are connected, the clause declaring certain sales, &c. void, if made within six months before the petition by or against the bankrupt was filed, following the clause forbidding preferences and ending with a period after the word "bankrupt." Then follows the provision to be construed which reads as follows: "And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

Argument to show that the transfer and conveyance in this case was not made in the usual and ordinary course of business of the debtors, is quite unnecessary, as the proofs show that they were retail dealers, and that they mortgaged all their property to the appellants, leaving more than two-thirds of their indebtedness wholly unsecured, so that if that provision applies to the first clause of the section, the burden of proof is unquestionably shifted upon the respondents. Had the provision in question preceded the second clause, the argument that the second clause was unaffected by it would have been entitled to great weight, and if so, and it was intended to make it applicable to both, then it must follow the second or be separated, which could hardly be expected, judging from the usual course of legislation. Connected together as the two clauses are in the same section, it seems reasonable to suppose that congress intended that the special rule of evidence prescribed should apply to cases arising under both, especially as every word of the provision

except the word *sale*, is as applicable to the first clause of the section as to the second, and even that is not entirely inapplicable to the case before the court, as the mortgage contains a stipulation that the mortgagees may enter whenever they see fit and take possession of the mortgaged property for their better security.

Both of these clauses were borrowed substantially from the insolvent law of Massachusetts, the first corresponding with the eighty-ninth section of that law, and the second clause corresponding with the ninety-first section of the same law. Gen. Stat. Mass. 593-4.

Separated as the two enactments were in that law, by an intervening section, the argument that the special rule as to the burden of proof which is prescribed in the ninety-first section, applied only in cases arising under that section, was much stronger than in the case before the court, as the two clauses of the enactment in the bankrupt act are connected together and form a part of the same section; but the supreme court of that state held, notwithstanding that the two enactments were separated by an intervening section, that the provision in question applied to cases arising under the eighty-ninth section as well as to those arising under section ninety-one, which contains that provision. *Nary* v. *Merritt et al.*, 8 Allen 452; *Metcalf et al.* v. *Munson et al.*, 10 Allen 491.

Apparently it was the fact that the two sections were separated by an intervening one which occasioned the "difficulty in construing" the provision, but no such embarrassment exists in the case before the court, as congress has eliminated that difficulty by uniting the two enactments in one section, and by re-enacting both since the decisions of the supreme court of that state were published, without employing a word to indicate that the construction adopted by that court is not correct.

Assume that the special rule of evidence mentioned applies to cases arising under the first clause as well as to those arising under the second, then it follows that the circum-

stances attending the execution of the mortgage, and the transfer of the property, affords *prima facie* evidence that the transfer was made in fraud of the provisions of the bankrupt act. Attempt was made in argument to overcome that presumption, but it is sufficient to say that it was wholly unsuccessful.

Decree affirmed with costs.

U. S. CIRCUIT COURT—MINNESOTA.

[June term, 1871.]

A mercantile firm having no property but their stock in trade, are insolvent within any accepted or sound definition of that term as used in the bankrupt act now in force, who, when pressed for a debt admitted to be just, give as a reason that they are unable to pay it, and suffer judgment to be rendered against them. Hence, any creditors issuing execution on a judgment so obtained, must be held to have had reasonable cause to believe their debtor insolvent, and property so taken will be restored to the assignee.

WILSON, Assignee, v. *CITY BANK OF ST. PAUL.*

This is a bill in equity, filed in this court by the assignee in bankruptcy, of the firm of Vanderhoof Brothers against the City Bank of Saint Paul. The object of the suit is to determine which of the parties has the better right to the stock of goods of the bankrupts or the proceeds thereof. The assignee claims these goods, or their value, as assets of the bankrupts. The bank, on the other hand, maintains that it secured a valid lien thereon by virtue of the judgment and execution hereinafter mentioned.

The judgment and execution the bill attacks as being obtained in violation of the bankrupt act. The pleadings and proofs show the following state of facts: About the twentieth day of July, eighteen hundred and sixty-nine, Vanderhoof Brothers purchased of Mrs. Marvin a small retail boot and shoe store in the city of St. Paul, for the sum of two thousand dollars, and gave their notes therefor, one for one thousand dollars, due in six months from the said twentieth day of July; one for five hundred dollars, due in eight months,

and the other for five hundred dollars, due in one year. Vanderhoof Brothers commenced business with a capital not exceeding six or eight hundred dollars. Before the purchase of the stock was made, the City Bank of Saint Paul, through Mr. Upham, the cashier, at Vanderhoof's request, agreed to discount said note for one thousand dollars, and afterwards did so, and it is one of the notes on which the bank subsequently recovered judgment as hereinafter stated. On the twenty-second day of January, eighteen hundred and seventy, the bank commenced suit against Vanderhoof Brothers, in the state court, on a note dated December twenty-fourth, eighteen hundred and sixty-nine, for two hundred and nine dollars, due January fifteenth, eighteen hundred and seventy; on a note for three hundred and fifty dollars, dated November second, eighteen hundred and sixty-nine, payable to the bank, and due January first, eighteen hundred and seventy (endorsed January nineteenth, eighteen hundred and seventy, one hundred dollars); a note for six hundred dollars, dated November twentieth, eighteen hundred and sixty-nine, payable to the bank, and due January nineteenth, eighteen hundred and seventy; and, also, on the above mentioned note given to Mrs. Marvin for one thousand dollars, which matured January twentieth, eighteen hundred and seventy. On the twenty-sixth day of February, eighteen hundred and seventy, judgment, by default, was taken on these notes in favor of the bank and against Vanderhoof Brothers of two thousand one hundred and thirty dollars, and on the same day an execution was issued and placed into the hands of the sheriff, and immediately afterwards levied upon the whole stock in trade of the debtors, and the same was subsequently (March twenty-fifth, eighteen hundred and seventy,) sold, yielding the sum of two thousand three hundred and eighty-five dollars and seventy-one cents, which is now in the hands of the clerk of the United States district court.

The sale by the sheriff was first enjoined by the United States district court, but the judge thereof, on a showing that such a sale was expedient, allowed it to be made on condi-

tion that the proceeds should be deposited therein. On the eleventh day of March, eighteen hundred and seventy, (after the levy and before the sale under the execution) a petition in bankruptcy was filed in the United States district court against Vanderhoof Brothers, and they were (March twenty-fourth) adjudicated bankrupts, and the complainant appointed the assignee. The stock in trade levied on and sold constituted all the property of the bankrupts. In addition to the above facts, D. W. Vanderhoof, as a witness for the plaintiff, testified that they transacted all their business with the City Bank, of which Mr. Upham was the cashier and active man; that they kept their bank account there; that in December, eighteen hundred and sixty-nine, Mr. Upham called upon them at their store for a statement of their business affairs and condition; he took it down on an envelope; it was taken from their books, and showed their debts and accounts falling due from October, eighteen hundred and sixty-nine, to March, eighteen hundred and seventy; it showed their debts, excluding what they owed the bank, to be three thousand five hundred dollars, and including that, the debt to the bank, five thousand six hundred dollars, and that their assets at cost price exceeded their liabilities.

The witness also stated that in October, eighteen hundred and sixty-nine, an inventory was taken which showed six thousand five hundred dollars stock, and it had not decreased one thousand dollars when statement was made; that the assets remained about the same until the levy, and were then of the value of five thousand five hundred dollars, but cost more than that.

He says: "We did not pay the notes to the City Bank, because we did not have the money. I told the officers of the bank so—that we did not have the money. They urged payment, and I told them we were doing the best we could to collect money and to sell goods to pay them. I told them this about every time a note became due and when renewal notes were given, and in January, eighteen hundred and seventy. I told them we had plenty of goods to pay all of

our debts if they would not crowd us." * * "It was through my influence that Mr. Upham advanced the one thousand dollars to Mrs. Marvin, of whom we bought." * * "I had no conversation with Mr. Upham about the suit. After it was brought he told me that on Mr. Reed coming into the bank he disliked the account, and had forced him (Upham), to do what he had done. I told Upham I had done the best I could about making payments."

Mr. Johnson, a resident creditor, testified that after the levy he asked Vanderhoof "why he allowed the City Bank to take judgment without letting him know that suit had been commenced," to which he replied, "because he felt under obligations to Mr. Upham."

This statement, Mr. Vanderhoof, being called as a witness by the bank, denies.

Mr. Mason, a creditor, testified that he asked Upham about the judgment, and he said he knew exactly how the firm stood, how much they owed, and where and when it would become due, mentioning a large Chicago debt of two thousand one hundred dollars, and that they could not pay it, and that Vanderhoof had promised him that if they got into trouble he would make their claim good, and he had this understanding with him.

Mr. Upham, as a witness for the bank, testified that he had some conversation with Mr. Mason about the affairs of Vanderhoof Brothers, but denied that he had ever made the statement to which Mr. Mason testified, or any statement of the kind, or that he had ever had any such understanding with Vanderhoof. He stated that suit was brought because Mr. Reed had bought a controlling interest in the bank, was vice-president, and insisted that the claim should be collected. He testified that the statment made to him by Vanderhoof was such a one as the bank requires of all their customers whose affairs they do not know all about. It showed, as near as he could remember, that the assets exceeded liabilities by about fifteen hundred dollars, and he says he considered him solvent, and so reported to Reed, the

vice-president, who nevertheless insisted that the debt should be collected, and that this was the reason suit was brought, and that he so stated to Mr. Vanderhoof.

ROGERS & ROGERS and C. K. DAVIS, for the assignee.

NEWELL & BILL, for the bank.

DILLON, C. J.—There can be no reasonable doubt that in January, eighteen hundred and seventy, when the bank commenced suit, Vanderhoof Brothers were insolvent. They had no assets except their stock in trade. Not to mention other debts, they owed the bank over two thousand one hundred dollars. They had no money with which to pay, and no means with which to raise money except their stock of merchandise, which at cost price did not more than equal the amount of their liabilities, and which, when sold by the sheriff, did not bring more than about one-third of what they owed. Plainly, they were insolvent. They were urged to pay, and only failed to pay because they could not; and this was the reason they declared to the bank. Surely, a mercantile firm, having no property but their stock in trade, who, when pressed for a debt admitted to be just, gives as a reason that they are unable to pay it, and suffers judgment to be rendered against them, is insolvent within any accepted or sound definition of that term as used in the bankrupt act, and this, although the stock in trade, may, at cost price or cash value, could it be sold for what it is worth, equal or exceed the trader's liabilities. The notes held by the bank and which its suit was brought were commercial paper, and one of them was, at the time suit was commenced, more than fourteen days past due, and was not paid, simply because the bankrupts were unable to pay it. This was of itself an act of bankruptcy and proof of insolvency. *Shawhan* v. *Wherritt*, 7 How. 644; *Smith* v. *Buchanan*, 4 N. B. R. 134; and of all these facts the bank had notice.

I lay out of consideration as not sustained by the evidence the allegation of the bill that the Messrs. Vanderhoof procured the judgment to be rendered; nor is it shown that

there was any collusion between them and the officers of the bank with reference to the suit which the bank commenced. Undoubtedly the debtors would have preferred that suit should not have been brought; but payment being demanded which they were unable to make, and having no defense to the notes, and feeling friendly to the bank and under obligations to it, they suffered judgment to go against them, knowing, of course, that they could not meet it, and that their stock was liable to be, and probably would be, as it was, seized to pay it. Now under these circumstances, has the bank a right to hold the preference which it has sought to gain by its judgment and execution? If so, the bankrupt act, known to have been framed to supersede the system of preferences and to place all unsecured creditors of an insolvent upon the same footing, is signally defective. If the debtors had turned out their goods to the bank in payment of these notes, clearly the bank could not, with its knowledge of their condition, have held them against the assignee. Section thirty-five.

The act dissolved all attachments made within four months of its taking effect; and it is planted full of provisions intended to secure equality and to prevent preferences. The bankrupts did not, before judgment, give notice to their other creditors in the same city or elsewhere that the bank had sued them. The motive of the bank in bringing suit was to secure their debt, and a knowledge of the condition of the debtors prompted the suit. The bank knew facts which, in law, showed their debtors to be insolvent and that they had committed an act of bankruptcy in not paying one of the notes in suit when urged to do it.

As the debtors did not defend the action, nor give notice to other creditors that it had been brought, nor go into bankruptcy and were insolvent, I have no difficulty in holding that they suffered judgment to go against them and permitted their property to be seized on an execution with the intent to defeat the act.

Of these facts the bank was cognizant, and the requisite intent on the part of debtors to give, and on the part of

the bank to obtain, an illegal preference, may and should be inferred from the circumstances. These circumstances are the known insolvency (in the legal sense) of the debtors, the fact that they had committed an act of bankruptcy; that they had no property but their stock in trade; that being pressed to pay, they were unable to do so; that they gave no notice of the suit, and did not defend it, or go into bankruptcy, nor otherwise make any effort to prevent the judgment, levy or sale; and that the effect of sustaining the executive proceedings would be to allow one unsecured creditor to make his whole debt, and leave the other creditors nothing. To sustain the right of the bank to the benefit of its judgment and levy, would subvert the bankrupt act, and if such a claim were maintainable, the bankrupt act would be speedily repealed, so as to allow all creditors to strive for preferences.

A decree should, in my opinion, be entered establishing the right of the assignee to the money produced by the sale of the goods, and ordering the defendant to pay the costs of this suit.

The testimony shows that the property brought a good price, and I do not think we should charge the defendant with the difference between what the property sold for, and its supposed market value at the time it was seized.

NELSON, J.—I cannot assent to the conclusions of the circuit judge in this case. I agree that Vanderhoof Brothers, being merchants, had committed an act of bankruptcy in not resuming payment of their commercial paper within a period of fourteen days after suspension, and were thus legally insolvent at the time the bank commenced suit. I also agree that when urged to pay, they told the cashier that they had no money to pay their debts with, but that their property was ample to meet all their liabilities.

The bank, with knowledge of this condition of the debtors' affairs, commenced suit, obtained judgment by default, and the sheriff made a levy by virtue of an execution issued before the bankruptcy proceedings were instituted.

The question is now presented: Did the debtors, by remaining passive while all these proceedings were progressing,

from the time of the service of the summons down to and including the final levy under the execution, suffer their property to be seized by legal process, with intent to give a preference to the bank, or with intent to delay and defeat the bankrupt act, and did the bank have reasonable cause to believe that a fraud on the act was intended?

The *intent* to prefer is a necessary ingredient of the charge made in the bill of complaint, and must be proved. There is no direct evidence to establish any consent by the debtors to the commencement of a suit, nor is there evidence of collusion between them and the bank. They said nothing in their interview with the cashier at the time when informed that the directors had determined to enforce the collection of the notes by law, which would in any manner show any operation of the mind to give a preference. Johnson, a creditor, in his testimony, says, that one of the Vanderhoofs told him "that he did not inform any of his other creditors of the commencement of suit by the bank, because he felt under obligations to the cashier."

This statement is met by the debtor with an emphatic denial, so that I am satisfied that nothing was said by the debtors which would fix upon them an illegal intent.

The counsel for the complainant invokes the familiar principle that every person is presumed to intend the natural consequences of his acts, and contends that the result of all the proceedings instituted by the bank, and the conduct of the debtors, enabled the former to obtain a preference, and therefore we must presume that the latter intended it.

I cannot give my assent to the application of the rule to the facts as they exist in this case. The debtors had no defence to the notes sued upon. The liability was incurred for a valid consideration. The cashier of the bank knew all of the circumstances under which a large part of the indebtedness had been created, and the judgment was obtained not only "without any act on the part of the debtors, but in spite of them;" for any defence they might interpose would have been sham, and merely delayed the final judgment. The law

of this state would not justify any such conduct on the part of the debtors, and no honest debtor would seek to delay a recovery of a just debt by interposing a sham defence.

Upon this state of the case how can the judgment, obtained by due course of law, prove an intent to prefer the judgment creditor?

It is said by counsel that the debtors should have defeated the action of the bank by voluntarily filing a petition in bankruptcy. I can find nothing in the law requiring an insolvent debtor voluntarily to put himself into bankruptcy. Various reasons satisfactory to himself and entirely consistent with good faith, may influence him and prevent such a step. He may not wish to acknowledge, by so doing, that he is hopelessly ruined in his business, or he may think he will still be enabled, with his property on hand, to arrange with his creditors, by obtaining an extension of time within which to pay off his indebtedness.

Entertaining these views, I cannot believe that in this case, when the debtors have sworn that they did not intend to give a preference to the bank, such intent can be fairly inferred because they did not seek the bankrupt act.

If the judgment obtained under these circumstances does not substantiate the charge of an intent to prefer, did the further proceedings by the sheriff, to wit: a levy by virtue of an execution establish the charge that the debtors suffered their property to be seized by legal process, with the intent to give the preference?

The laws of this state provide that a judgment is a lien upon real estate as soon as docketed, and point out the steps necessary to be taken to make it a lien on personal property. The law directed the sheriff, in the discharge of his duty, and the lien became perfect on the personalty of the debtors, without any participation on their part in the matter.

The lien, having been thus obtained before bankruptcy proceedings were commenced, in my opinion, is protected by the act and can be enforced. If, on the contrary, it is not to be recognized as valid, but is to be recognized as a fraud

upon the bankrupt law, congress must say so, or the supreme court so decide.

The circuit judge being of the opinion that the assignee should recover, the following questions were certified to the supreme court.

1. Whether or not an intent on the part of said debtors, Vanderhoof Brothers, to suffer their property to be taken on legal process, to wit: the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts.

2. Whether, under the said facts, the said bank, in obtaining said judgment, and making the said levy, had reasonable cause to believe that a fraud on the bankrupt act was intended?

3. Whether, under said facts, the bank obtained, by the levy of its execution, a valid lien on the said goods as against the assignee in bankruptcy?

UNITED STATES CIRCUIT COURT—MISSOURI.

Although a register may have no authority to take a particular deposition, he has full authority to administer oaths, and when by the assent of parties he has taken such a deposition to be used in evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the party causing the deposition to be so taken cannot object.

It is not error to direct the attention of the jury to the distinction between "reasonable cause to believe," and "actual belief."

If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large portion of the insolvent's property, and gives notes payable at long dates, cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, that is certainly a transfer of the bankrupt's property to his wife in fraud of his creditors through the agency of the wife's father, and therefore fraudulent and void.

LAWRENCE, assignee v. *GRAVES.*

TREAT, J.—Many of the errors assigned are *dehors* the record. This was an action, substantially, of trespass *de*

bonis asportatis. The declaration avers that the bankrupt did, on the (blank) day of October, eighteen hundred and sixty-nine, "transfer, assign and convey" (the statutory terms) to the defendant, &c.

The counsel below seems to have supposed the time material, and that the cause of action was limited to a technical assignment, as under the state statute, and consequently no evidence was admissible as to any other form of an alleged frandulent transfer or conveyance, or as to any such transfer or conveyance at a different time from that stated in the declaration. The declaration is so framed as to cover any fraudulent transfer, assignment or conveyance during the six months prior to the filing of the petition in bankruptcy. Hence all the errors assigned, which are based on the incorrect hypothesis of counsel below as to the cause of action, disappear.

It is said there is no evidence that Andrews was adjudged bankrupt, or the plaintiff appointed assignee. The declaration avers these facts, and that the adjudication, etc., was made by the court which tried the case; and frequent reference is made at every stage of the case to the records of the court in the bankruptcy proceedings, showing that those records were produced and recognized as in evidence. No objection was made below that they were not *formally* read or offered in evidence; but all parties treated them as before the court and jury.

It appears that the defendant caused the deposition of Higgins to be taken on notice, before Register Lindenbower, and that at the time and place designated, both parties appeared by counsel and examined, cross-examined and re-examined the witnesses at great length; that said deposition was duly filed in said cause, and that defendant moved to strike the same from the files, on the grounds set out in the written motion therefor, and subsequently objected to the plaintiff's reading said deposition for reason stated. The grounds thus stated are, except in one particular, *dehors* the record, and for aught known to this court, the motion and

the objections were overruled, because it was apparent to the court that they had no foundation in fact. It does appear that the deposition was taken before a register at the instance of the defendant himself, and with the assent of the plaintiff, and after being duly certified was placed on file in the case.

In *Yeaton* v. *Fry*, 5 Cranch 335, one of the errors assigned was that the plaintiff was permitted to read in evidence, depositions informally taken by the defendant under a commission, and the supreme court held that there was no error committed, chief justice Marshall delivering the opinion. That case does not expressly determine all the points here presented, but it decides that, when depositions are not taken *ex parte* or *de bene esse* under the act of seventeen hundred and eighty-nine, or both parties appear and examine and cross-examine, and the depositions are subsequently placed on file, the party at whose instance they were taken, cannot object to their being read by the opposite party on the ground of any irregularity or informality. Having taken a deposition under the circumstances named, he cannot except thereto, nor cause the same to be suppressed. The officer before whom taken ought to cause the same to be transmitted to the court, for the benefit of all concerned, and once on file, the defendant could not suppress or withdraw them. Although a register has no authority to take such a deposition, yet he has full authority to administer oaths; and when by the assent of parties he has taken such a deposition to be used as evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the defendant causing the same to be so taken cannot object. The irregularity was defendant's, to which the plaintiff might have excepted, not the defendant.

We do not understand the record to show that there was any objection to the use of the deposition on account of the incompetency of the officer before whom it was taken; nor does the objection seem to have been made, that one party could not use the deposition taken by another, had it been properly certified, returned and filed. But there having been

an appearance before the officer by counsel of both parties and a full examination and cross-examination of the witness, and no showing that the witness was present in court, and the course pursued being conformable to the usual practice in the state, we unite in holding that the court did not err in allowing the deposition to be read, without now deciding that one party has in all cases an absolute right to use depositions taken by his adversary.

As the records of the court before the judge fixed the precise date at which Andrews' petition in bankruptcy was filed, and were absolute verity, no error was committed in stating that date to the jury.

To determine whether there was error in charging the jury, it is necessary to look to the whole charge, so as to ascertain whether one part thereof is not qualified by another, and thus the law fairly presented. The definition of insolvency in this case (the defendant being a merchant) was not only correct, but the allusion to another provision of the act, as illustrative of the reason of the rule, was unobjectionable.

All through the charge the court endeavored to enforce upon the jury that it was their exclusive province to weigh the testimony and determine what it established. Their attention was called to the testimony bearing upon certain points to be ascertained, and the rules of law in reference thereto stated. If the charge were to be considered as to each sentence or point, dissevered from the other sentences or points in the complex problem, room might exist for sharp criticism as to successive details; but the question for review is whether the law governing the case was fairly and correctly stated, and not whether another and different mode of presenting them would not have been more satisfactory to one or the other of the parties litigant.

The law on which is based the plaintiff's right to recover, requires these facts to be proved;

FIRST. The vendor was insolvent or in contemplation of insolvency, &c.

SECOND. The vendee had reasonable cause to believe such to be the condition of the vendor.

THIRD. The sale was made by the vendor with a view to contravene the provisions of the bankrupt act.

FOURTH. The vendee had good reason to believe such to be the view or intent of the insolvent vendor in making the sale.

Hence as to the vendor, it must be shown that he was insolvent, &c., and that he made the sale with the view named; and on the part of the vendee, that he had reasonable cause to believe the status of the vendor to be as charged, and his purpose or intent to be in making the sale a contravention of the act.

In ascertaining the alleged act of insolvency, it was proper to charge the jury in such a way as to give them a clear view of the legal meaning of the term. That was done. Not only was a correct definition of insolvency given, as applicable to a merchant, but it was illustrated by reference to another provision of the act. That illustration, so far from being ground of error, was quite appropriate, in order that the jury might have a clear understanding of the general proposition stated. So it was proper to direct the attention of the jury to the distinction between "reasonable *cause* to believe" and "actual belief"—between wilfully shutting the eyes against demonstrative facts and circumstances, and their obvious existence. In that respect the charge was more favorable to the defendant than a stricter statement of the rule might have justified.

The statute declares what shall be *prima facie* evidence of a fraudulent transfer, and when such a *prima facie* case is made out, and no explanatory evidence is offered, it is unnecessary for the court to enter upon minute or elaborate distinctions as to the force and effect thereof. The case should be treated in the light of the law as applicable to the testimony produced, and not with reference to supposed or imaginary states of proofs possible to be adduced in some other cause. The jury are to be instructed and not confused; and there is

no need of going beyond the legal requirements of the case presented. In the light of the testimony, the court was called upon to define the rules of law applicable thereto, and did so without repeating each element of the problem as it passed to the next in logical order.

The testimony sufficiently established the insolvency of the vendor, and reasonable cause of the vendee to believe the vendor insolvent. It also showed that the sale was made out of the ordinary course of business, and consequently there was *prima facie* evidence of fraud—fraud on the part of the vendor, in which the defendant was directly participating. If the law declares a sale under given circumstances *prima facie* evidence of fraud, it is *prima facie* evidence to all concerned, to the vendee as well as to the vendor. It is difficult to perceive how, when *prima facie* evidence of a fact is presented, a person has not reasonable cause to believe the fact to exist, or, in the language of the decision, "to be put upon inquiry."

Dealing with the case as it thus stands, the court below brought with sufficient clearness to the minds of the jury the legal rules by which their action was to be governed, and guardedly stated that it was exclusively for them to give, even to the *prima facie* evidence, such weight as they might deem proper.

In referring to the testimony concerning the mortgage on the property of the bankrupt's wife, and the manner in which by the contrivance of the defendant and bankrupt conjoined, that mortgage was paid off at the expense of the creditors, the court used the strong language in which the law characterizes such a transaction. Certainly there is no assignable error on that ground. If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys out of the usual course of trade a large, if not the largest portion of the insolvent's property, and gives notes payable at long dates, and then cashes the notes and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the

bankrupt son-in-law, it is not improper to say the law frowns on such contrivances for using the bankrupt's means to the detriment of his honest creditors. That transaction obviously was the transfer of the bankrupt's property to his wife in fraud of his creditors, through the agency of his wife's father, for the benefit of herself and of his son, the mortgagee.

The defect in the declaration was cured by the verdict under the statute of jeofails.

DILLON, Circuit Judge, concurs.

Affirmed.

U. S. DISTRICT COURT—NORTH CAROLINA.

1. The widow of a bankrupt, where petition in bankruptcy was filed after the act passed by the legislature of North Carolina, repealing the statutory provision and restoring the common law right of dower, the bankrupt dying after the issuing of the warrant in bankruptcy, is entitled to dower in the land owned by the bankrupt at the time of the filing of his petition.
2. The act referred to repealed the statutory provision in regard to dower, which in effect restored *eo instanti* the common law.
3. The legislature by that act attempted to create additional exemptions to those theretofore allowed by law; those exemptions are void as to creditors whose debts were contracted previous to the passage of the act.
4. The widow of a bankrupt is not entitled to the personal property exempted by the provisions of the fourteenth section of the act of eighteen hundred and sixty-seven, nor is the assignee in bankruptcy. No title to exempt property passes to the assignee by the assignment; it remains in the bankrupt; at his death it passes to his legal representatives.

In re JOHN H. HESTER.

BROOKS, J.—There are two questions to be considered and determined, asked by the assignee in his petition in this case.

1. Is the widow entitled to dower in the land owned by the bankrupt at the commencement of proceedings in bankruptcy; the widow being the wife at the commencement of such proceedings, and the bankrupt dying after the issuance of the warrant in bankruptcy?

I have no doubt as to the proper answer to be given to this question. The legislature of North Carolina, by chapter

three, acts of eighteen hundred and sixty-eight and eighteen hundred and sixty-nine, repealed the existing statutory provisions in regard to dower, and *eo instanti* restored the common law right of dower. The legislature undertook to do much more than repeal the statutory provision for dower, for the act expressly restores the common law dower; in addition thereto they undertook to vest the wife of a living husband with dower in the land of her husband. If this was the intent of the legislature its effect would be to create an additional exemption of property of a debtor from liability to his creditors for debts existing at the time of the passage of the law, as against the claims of such creditors it would be void. For this reason I have heretofore decided *in re* Kelley, 3 N. B. R. 2, that a wife is not entitled to dower in the lands of her living husband, in any case in which debts are due from the bankrupt which were contracted previous to the passage of the act referred to.

The question presented here is essentially different. After the petition was filed in this case, and the warrant issued, Hester, the petitioner, died, leaving a widow who claims dower in the lands owned by her husband at the time of his bankruptcy. The proceedings in bankruptcy were commenced subsequent to the passage of the act of the legislature above referred to.

The widow of the bankrupt is undoubtedly entitled to dower in the land in question. To show this, it is only necessary to ask what interest or estate in the lands Hester could have conveyed after the restoration of the common law right of dower had been restored, and before his bankruptcy, without the proper relinquishment of his wife? He could only have conveyed the land subject to the contingent right of dower, which would never ripen into any positive right if the wife should die before her husband, but which would become an absolute positive right at the death of the husband—the wife surviving. This is all the estate the husband could have conveyed or which could have been sold by his executors or administrators, and it is clear that this is all the estate in the

land that the assignee takes by virtue of the bankruptcy and the assignment of the register. The assignee can sell no more or higher estate than he receives, and the widow is entitled to all her rights in the land, though they are in the hands of the assignee, the same as she would be if they were in the hands of heirs at law, or purchasers.

There has been no period of time under the written or common law, when a widow was not entitled to dower. The moment the statutory provision became inoperative by reason of its repeal, the common law was in full force, affording, by its munificent provisions, its protection to the "favorites of the law."

2. The second question submitted is as follows: Is the the widow of the bankrupt entitled to the personal property set apart and exempted to the bankrupt under the provisions of the fourteenth section of the act?

I might sufficiently answer this question by saying that the assignees are not entitled to any of the property so exempted, and it is no concern of theirs who may have a right to the same.

The law attaches no responsibility to them for property to which it gives them no title. The assignment of the judge or register passes no title or interest whatever in the exempted property to the assignee.

The fourteenth section of the bankrupt act, after providing for the assignment, proceeds as follows:

"*Provided*, however, that there shall be exempted from the operation of the provision of this section, the necessary household and kitchen furniture, &c."—and after enumerating all the exemptions it proceeds—"*provided*, that the foregoing exemptions shall operate as a limitation upon the conveyance of the property of the bankrupt to the assignee."

I cannot imagine how language could render it more certain that the assignee acquires no title to any of the exempted property.

It is not difficult, however, to see that the title to such exempted property would vest in the executor or administra-

tor of the bankrupt at his death, or on the qualification of either (unless the bankrupt should dispose of the same during his lifetime), to be by such representatives administered according to law.

Let this be certified to T. B. Keogh, register in bankruptcy, to the end that he may certify the same to the assignees of the estate of John H. Hester, bankrupt.—June, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK.

Where a bankrupt's discharge is opposed on the grounds that he has sworn falsely in the oath to his schedules, has attempted to conceal his property and has transferred certain shares of stock to one of his creditors with intent to give him a preference, a discharge will be granted where the evidence shows that he had no interest in the property in question; that the alleged transfer was made without any collusion or fraud on his part, and that the stock in question was held by a third party, free from any interest of the bankrupt.

*In re J. R. PENN, C. V. CULVER and L. H. CULVER.**

BLATCHFORD, J.—The specifications in regard to the jurisdiction of the court have been heretofore disposed of.

The third specification charges that C. V. Culver, in the oath to his schedules in bankruptcy, swore that he had no property in his own name or in the name of any other person, and in shares in any company, except ten shares of stock in the Reno Company of nominal value, whereas he owned ten thousand shares of the stock of the Reno Company, which stood on the books in the name of Robert F. Brooke, and were held by Brooke in trust and confidence for the use and benefit of C. V. Culver, as C. V. Culver well knew.

The fourth specification charges that C. V. Culver, owning such shares and fraudulently intending to conceal them, caused them to stand on the books of the company in the name of Brooke, whereas they were and are the property of C. V. Culver; and that C. V. Culver, fraudulently intending

* See 3 N. B. R. 145; 5 N. B. R. 30.

to conceal them and to prevent them from coming to his assignee in bankruptcy, omitted them from the schedule of his assets.

The sixth specification charges that C. V. Culver, being insolvent, transferred to a certain creditor of the bankrupt, certain shares of stock in the Reno Company, with intent to give a preference to such creditor over the other creditors of the bankrupts, and to defeat the provisions of the bankrupt act. The stock transferred to such creditor was some of the stock which stood in the name of Brooke. The question involved in the third, fourth and sixth specifications is whether the stock which stood in the name of Brooke was the property of Culver, or was held by Brooke in trust and confidence for the use and benefit of Culver, and examination of the testimony leads me to the conclusion that the opposing creditors have not established that such stock was the property of Culver, or was held by Brooke in trust for Culver.

The only trust shown is a trust created by Brooke for the benefit of such of the creditors of the bankrupts, who were such on the twenty-seventh of September, eighteen hundred and sixty-seven, as should choose to take for their debts, shares of stock in the Reno Company at par, such shares being the absolute property of Brooke, free from any claim or interest of Culver. The title of the bankrupts to all stock in the Reno Oil and Land Company, passed away from them to Jordan. Jordan afterwards acquired title to the lands of the company. Such lands passed to Brooke. They were made by him the capital of a new company called the Reno Company, and he created the trust referred to for the benefit of the creditors of the bankrupts, with a view to relieve the bankrupts from their debts, and at the same time to secure the co-operation of such creditors as stock-holders in the company, and avail himself of the energy and skill of C. V. Culver in developing the interests of the company and making valuable the entire stock, as well that reserved to himself as that offered to the creditors.

I see nothing reprehensible in this. On the contrary, it

is clear from the testimony that, but for this arrangement and offer to the creditors, they would have received nothing. The property of the bankrupts had passed away from them, and there was nothing which the creditors could reach, unless it should be voluntarily offered for their acceptance by the party claiming the property under just such an arrangement as was made.

The fifth specification charges that C. V. Culver, with the fraudulent intent of controlling the appointment of an assignee in bankruptcy in this proceeding, procured a certain false and fictitious debt to be proved against the estate of the bankrupts, and fraudulently, knowingly, and wilfully admitted such false and fictitious debt. This specification is not proved. Discharges are granted to all three of the bankrupts.

F. N. BANGS and W. S. OPDYKE, for the bankrupts.

A. B. MCCALMONT and R. SEWELL, for the creditors.—June 6, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK

When a bankrupt amends his schedule after an assignee has been chosen, so as to include an additional creditor for a considerable amount, it is not necessary to notify the creditors already named in such schedules before the amendment can take place, or to call a new meeting of creditors.

If the creditor, after proving his claim, wishes to have the assignee already appointed removed, he can petition to the court in accordance with form number forty.

In re JAMES CARSON.

I, James F. Dwight, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings before me, the following questions arose pertinent to the said proceedings, and were stated by the counsel for the bankrupt, to wit: Mr. Horatio F. Averill, who appeared for the bankrupt, no one appearing for the creditors or in opposition.

On the twenty-eighth day of January, eighteen hundred and seventy-one, said bankrupt was adjudicated a bankrupt.

On the third day of March, eighteen hundred and seventy-one, Mr. Richard Warren was duly chosen assignee of said bankrupt, and on the tenth day of March, eighteen hundred and seventy-one a formal deed of assignment was duly executed to said Warren.

On the fourth day of April, eighteen hundred and seventy-one application was made by said bankrupt for leave to amend his schedules as filed herein, and an order was made by me on that day, that he have leave to amend his schedule annexed to his petition in bankruptcy by adding thereto the name of Edward H. Thompson, of Flint, Michigan, as a creditor for the sum of two thousand dollars, together with a statement of the indebtedness, &c.

On the nineteenth day of April, eighteen hundred and seventy-one, an amended schedule pursuant to said order was filed with the clerk of this court in bankruptcy, and a certified copy thereof furnished to me, and the questions arising thereon, as stated by counsel were

First, As to how the creditor, brought in by such amendment, should be notified of a meeting before the register for the purpose of proving his claim and choosing an assignee?

Second, Is it necessary to again notify the creditors named in the bankrupt's schedules before such amendment took place?

Third, If it only be necessary to notify the creditor so brought in by amendment, then, in case such creditor does not appear on the day fixed for the meeting, will the appointment of the assignee already made, stand good or must the register re-appoint him?

And the said bankrupt, by his counsel, requested that the same should be certified to the Judge for his opinion thereon.

OPINION OF REGISTER.

I do not consider it necessary or proper that a new meeting of creditors to choose an assignee should be had. The

assignee already duly chosen is in possession of the estate, and probably is in course of settling it. A new meeting of creditors to choose an assignee, would not be in accordance with the spirit of the bankrupt act concerning choice of assignees, and would be a needless expense and delay.

If such a course were adopted, then, for each new creditor added by amendment to the schedule after the first meeting, a new meeting would have to be called.

I think that this creditor should be formally informed of the existence and condition of the suit, and notified by the bankrupt to prove his claim, if he so desires.

The creditor thus proving his claim would have the right to petition the court (in form forty, of the supreme court rules) for the removal of the assignee, if he had any desire and cared to do so.

Which questions and opinion is respectfully certified to the court, this twentieth day of July, eighteen hundred and seventy-one.

JAMES F. DWIGHT, *Register.*

BLATCHFORD J.—I concur in the views of the Register.—July 25th, 1871.

U. S. DISTRICT COURT—S. D. NEW YORK

A register may be appointed by the bankruptcy court a special custodian of property advertised for sale under a mortgage, and be directed to sell the same under General Orders xix and xxi., with authority to make other advertisement than is required by the rules of the court. The order should designate the place where the moneys (proceeds of the sale) shall be deposited, as a separate fund subject to the further order of the court. The register will be directed to make the deed to the purchaser, and convey title under the order of the court free from certain liens in pursuance to section twenty of the act, and the lien of the mortgage will be transferred from the property so sold to the proceeds of the sale.

If advisable in order to obtain a better price for the property, injunctions already granted may be modified so that a sale may be had under a judgment, and the referee may make out the deed.

In re HANNA.

BLATCHFORD, J.—An order will be entered appointing the register in charge of this case to be special custodian of the

property advertised for sale under the mortgage to A. T. Stewart & Co., and directing him to sell the same under General Orders xix and xxi., and Rule xi. of this court, with such other advertisement of sale as shall seem to him proper, and to receive the proceeds of such sale and pay them into this court; they then to be deposited in the United States Trust company on interest to the credit of these proceedings as a separate fund, subject to the further order of this court. The deed to be given by the register to the purchaser will convey a title under the order of this court, free from the lien of the mortgage of September thirtieth, eighteen hundred and sixty-nine, in pursuance of the provisions of section twenty of the act, and the sale will be made free from such lien. The order will recite the application by A. T. Stewart & Co., and will direct that the lien of the mortgage be transferred from the property to be sold to its said proceeds. If it shall be thought desirable in order to obtain a better price for the property, the injunction may be so far modified that the sale may take place also under the judgment, and the referee may make out the deed. An order may be settled on notice to carry these provisions.

F. N. BANGS for A. T. Stewart & Co.

M. A. KUISHEEDT for petitioning creditors.

U. S. DISTRICT COURT—WASHINGTON TERRITORY.

A debt or principal must be proven or allowed before the costs made prior to the commencement of proceedings in bankruptcy can be proven and allowed. Costs are but incident, if there is no principal or debt there can be no incident Where the original debt has been proved and allowed, attachment costs can be proved as a general debt against the estate of the bankrupt if made in good faith before the commencement of proceedings in bankruptcy without a knowledge of the insolvency of the party, and with no intention to defeat the operations of the bankrupt act. Costs incurred after the commencement of bankruptcy proceedings, also costs for attaching and keeping the exempt property, disallowed.

In re CHARLES H. PRESTON.

On this twentieth day of July, eighteen hundred and seventy-one, before W. W. Theobalds, register in bankruptcy

of said district, personally appeared John J. McGilvra, of Seattle, in the county of King and territory of Washington, attorney and agent of Benjamin Stretch, sheriff of Snohomish county, in said territory, and after by me being duly sworn, says that the said Charles H. Preston, the person by whom a petition for adjudication of bankruptcy has been filed, was, at and before the filing of the said petition, and still is, justly and truly indebted to the said Benjamin Stretch, in the sum of one hundred and ninety-eight dollars, for costs in two certain attachment cases as follows: one hundred and thirty-seven dollars and seventy-five cents, in the case of White *v.* Preston, and sixty dollars and twenty-five cents in the case of Waterman & Katz *v.* Preston, and both commenced in the said district court, and returnable at the August term, eighteen hundred and seventy-one, a copy of which said fee bills are hereunto attached and marked Ex. "A and B," and made a part hereof, for which sum of one hundred and ninety-eight dollars or any part thereof, this deponent says that the said Stretch, as affiant, is informed and believes, has not, nor has any person by his order had or received any manner of satisfaction or security whatever. And deponent further says that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt or demand was incurred as above stated, and that the same, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

Subscribed and sworn to, this twentieth day of July, eighteen hundred and seventy-one.

JOHN J. MCGILVRA.

Before me, WM. W. THEOBALDS,
Register in Bankruptcy.

Third Judicial District of Washington Territory—ss.

I, William W. Theobalds, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following questions arose pertinent to the said proceedings, and was stated

and agreed to by the counsel for the opposing parties, to wit: John J. McGilvra, who appeared for claimant, Benjamin Stretch, and George N. McCaraber, who appeared as assignee and for the creditor, and by A. N. Merrick, who represented the bankrupt and certain creditors. The question at issue was whether the claim of Benjamin Stretch be allowed, of one hundred and ninety-eight dollars, for costs as sheriff, in an attachment or attachments against certain property of said bankrupt, by him claimed as exempt, should be filed and allowed and paid to him as one of the creditors of the bankrupt's estate. Said claim of Benjamin Stretch appears more fully in paper marked "A," filed with me, and made a part of this statement, and was objected to, and the grounds of objection stated in paper marked "B," also filed with me by G. N. McCaraber, assignee, and by Charles H. Preston, through his attorney, A. N. Merrick, and made a further part of this statement. And the said parties did agree, on July twentieth, eighteen hundred and seventy-one, before me, and before Judge Jacobs, that the above question should be certified to said Judge for his opinion thereon.

Dated at Seattle, this July twenty-first, eighteen hundred and seventy-one.

WM. W. THEOBALDS, *Register.*

Comes now the assignee of the above named bankrupt, George N. McCaraber, and objects to the proving and allowing of the claim of Benjamin Stretch, as a preferred or other claim against the estate of said bankrupt, on the following grounds:—

FIRST. For the reason that the claims of the said Stretch constituted no part of the indebtedness of the said Preston at the time of filing said bankrupt's petition, March eighteen, eighteen hundred and seventy-one; and that being for costs incurred in attaching and holding property claimed as belonging to the said Preston, he has no lien under the provisions of the bankrupt act.

SECOND. That if Stretch had a lien for his costs up to the

time of filing of the petition in bankruptcy, March eighteen, eighteen hundred and seventy-one, he lost and parted with the same when he sued, and lost possession of the property, March twentieth, eighteen hundred and seventy-one.

THIRD. That the claim of the said Stretch is not among those made provable under section nineteen of the bankrupt act, which section expressly excludes all others not mentioned in said section.

FOURTH. That the claim of the said Stretch cannot be admitted for this reason, that a greater part of the costs were created by attaching and holding property which was exempt under the laws of Washington Territory, and which has been set apart as exempt by the assignees for the benefit of said bankrupt.

FIFTH. That a part of said costs were incurrred in an attachment suit of Waterman and Katz, which claim never was filed in the bankrupt court for proof.

SIXTH. That the bill of costs is so rendered that it is impossible to decide how much costs were incurred upon the raft of logs, (even if he had a lien,) separate and apart from the exempted property.

SEVENTH. That a portion of said bill of costs was incurred after the filing of the petition of said bankrupt.

G. N. MCCARABER, *Assignee.*

C. H. Preston, by his attorney, A. N. Merrick, objects to the proving and allowing of the claim of the said Stretch, on the grounds above stated; and the said A. N. Merrick also appears to raise the same objection, as the attorney in fact of the following named creditors of the said Preston, viz:—G. W. Preston, Rothschild & Co., J. F. Sheehan, C. Eisenheis, and D. N. Hyde.

A. N. MERRICK, *Attorney for bankrupt and above named creditors.*

JACOBS, J.—Two bills of cost have been filed against the estate of said bankrupt by attaching creditors, and their

allowance asked for; or rather, the claim is preferred by the sheriff who serves the attachments, and for a while kept the property in exoneration of the attaching creditors.

The proof and allowance of these claims are objected to by the assignee, by the creditors who have proved their claims and by the bankrupt.

The questions arising thereupon have been duly certified up by the register for decision.

1st. Then, as to the cost bill preferred by the sheriff, in the case of "Waterman and Katz," it is objected by the assignee, because the claim of "Waterman and Katz" has never been proven. In other words "Waterman and Katz," have neither presented nor proven any claim against the estate of the bankrupt. This objection is well taken, and conclusively disposes of the sixty dollars and twenty-five cents claim against the estate in that case. The debt or principal must be proven and allowed before the costs made before the commencement of proceedings in bankruptcy can be proven and allowed. The costs are but incident. If there is no principal or debt, there can be no incident.

2d. In the case of J. P. White's attachment costs, several objections are made by the assignee, and certified up by the register.

First. It has already been decided by Judge Grier, that the sheriff has no lien or preference in this cost bill.

Second. The question now is, White's debt having been duly proven and allowed, whether the attachment costs can be proven as a general debt against the estate of the bankrupt. I am of the opinion that they can be, if made in good faith before the commencement of proceedings in bankruptcy, and were made without a knowledge of the insolvency of the party and with no intention to defeat the operations of the bankrupt act. It is not objected in this case that the attaching creditor knew of the insolvency of the bankrupt, or that the attachment was made to defeat the operation of the bankrupt law. But it is objected that a part of these costs were made after the commencement of proceedings in bankruptcy.

I find in reference to the cost bill on file, that fifty-six dollars have been charged for service and return of attachment on a boom of logs, and for keeping the same to March twentieth, eighteen hundred and seventy-one. Proceedings in bankruptcy were commenced on the eighteenth, hence all attachments were dissolved at that date. Hence, I disallow two days keeping at the rate charged, (two dollars per day) and allow the rest, fifty-two dollars.

THIRD. The charge for attaching and keeping the oxen and camp gear turned over to the bankrupt as exempted property is all disallowed. The sale of said property was null and void. 1st, Because it was made after the commencement of proceedings in bankruptcy, and 2d, Because the property was not subject to attachment and sale under the laws of this Territory or the bankrupt law.

The register is directed to allow, upon due proof, the fifty-two dollars specified herein, to be paid in the regular order of distribution.

GEORGE N. MCCARABER & A. N. MERRICK, for creditors and bankrupt.

JOHN MCGILVRA, for Stretch.

UNITED STATES DISTRICT COURT—W. D. WISCONSIN.

It is the duty of the bankruptcy court to see that the bankrupt's exempt property is secured to him. Property exempt by the laws of the state of the bankrupt's domicile is also exempt by the fourteenth section of the present bankrupt act.

The right of creditors to prosecute their attachment suits after the commencement of bankruptcy proceedings is taken away, and all attachments issued within four months are dissolved by the said act. An officer in possession of property, under a writ of attachment, cannot refuse to deliver it until his fees are paid. He must apply to the court to be paid out of any funds that may be in the hands of the assignee belonging to the bankrupt.

In re W. S. STEVENS.

This was a case of voluntary bankruptcy. The petition was filed September thirtieth, eighteen hundred and seventy, and at the request of the bankrupt, a provisional assignee

was appointed of his estate. A portion of the property at the time (a span of horses, wagon and harness) was in the possession of a constable, in Winnebago county, Illinois, under and by virtue of attachments issued against the bankrupt, by a justice of the peace of the state of Illinois, in favor of divers creditors of the bankrupt residing in Wisconsin. The property thus held was claimed by the bankrupt, in his petition, as exempt under the bankrupt act. The attaching creditors now moved the court to modify the order appointing the provisional assignee, so as to exempt from the operation thereof the property attached and held in the state of Illinois.

C. A. PARSONS, for bankrupt.

S. J. TODD, for creditors.

HOPKINS, J.—The ground of this motion is that by the laws of Illinois, the property was not exempt, and that by the attachments the creditors acquired a valid lien upon it as against the bankrupt act; and further that as under the bankrupt act it would be exempt and would not pass to the assignee, the bankrupt was the only party who could contest the right to the property under the attachment; that the assignee has no right to take possession of it under the act, nor had the other creditors any right or interest in the question, for if released from the attachment it would be exempt under the bankrupt act, and if held, it would be taking property they could not in any way reach. This is an ingenious view of the question, but I think untenable. I think it is as much the duty of the court to protect the rights of the bankrupt as the creditors. If by the act he is entitled to certain exempt property, it is the duty of the court to see that he has it. When a bankrupt surrenders all his property to his creditors, except certain portions which the act exempts for his own use and the use and convenience of his family, it is the duty of the court to see that the portion he is entitled to is secured to him, as much as it is to see that

the portion he is required to surrender to his creditors is surrendered to them.

This court proceeds under the bankrupt law only, and administers that, and has original jurisdiction as to all matters and things to be done under and by virtue of the bankruptcy. One of the things to be done under the act, is to assign and set off to the bankrupt, the exemptions mentioned in the fourteenth section. The bankrupt claims under that section this property that is attached, and it is the duty of the court, if it is exempt by that act, to assign it to him as exempt property. No one will deny that it is exempt by the laws of this state, the domicile of the bankrupt, and being so it is unquestionably exempt by the fourteenth section of the bankrupt act.

Now can this court look into the laws of Illinois, to see whether it is exempt there or not? What has this court to do with the exemption laws of Illinois? I cannot see that it has anything. It must administer the bankrupt act and settle and determine the rights of the bankrupt and his creditors under that act alone. If under that act, a creditor has a valid lien, or one that it recognizes, then it will be sustained; and if that act does not recognize the lien then it cannot be sustained. It may be true that but for the bankruptcy proceedings, the attaching creditors could have held the property, and the same may be said of all attachments against bankrupts' estates that are dissolved by proceedings in bankruptcy.

After the commencement of proceedings in bankruptcy, all proceedings by the creditors in the state courts against the bankrupt are forbidden, and all attachments issued within four months are, by the express terms of the act, declared to be dissolved without reference to the property upon which they are levied; the object of the act being to stop at once all proceedings against the bankrupt in any other court, and to bring all matters and questions between the bankrupt and his creditors into the bankrupt court for final settlement.

Now if this is so, how is the question as to whether this

was exempt property material? The creditors' right to prosecute their attachment suits being taken away and their attachments being dissolved, what claims here they by virtue of the attachments to assert?

The district court for the eastern district of Missouri, *in re* Ellis, 1 N. B. R. 154, has given a like construction to the act, and the district court of South Carolina, *in re* Hambright, 2 N. B. R. 167, holds that the bankrupt is to be regarded as a *purchaser* of his exempt property, the consideration being the surrender of all his other property for the benefit of his creditors.

This view disposes of the motion of the creditors; but they insist that the officer should not be required to give up the property until his fees and charges upon it are paid, and there are some cases to the effect that he is entitled to his fees, but not I think that he can refuse to deliver the property until they are paid. For if the attachments by virtue of which he holds the property are dissolved, he has no means of enforcing his liens against the property. He cannot sell it. His remedy, if he has a lien, is to apply to this court to have it allowed and paid out of the assets that may come into the assignee's hands, and this court could on such an application make such an order as might appear just and equitable in the premises; but I do not think he can interpose his lien as against the right of the officers of this court to the possession, and withhold the property from them until it is paid.

Motion denied.

U. S. DISTRICT COURT—E. D. MICHIGAN.

Where a note payable on demand was not presented for payment, and no demand made within four years, a protest at that time could not fix the liability of the endorser, and a claim of this nature cannot be proved against the estate of a bankrupt endorser.

In re FRANCIS CRAWFORD.

On questions arising upon the claim of Josiah F. Mann, against the said bankrupt's estate, certified by the register,

Hovey K. Clarke, Esq., (together with his opinion that the claim ought to be allowed), the same having been adjourned into court for decision.

The claim is against the bankrupt as endorser of a promissory note payable on demand. No demand was made until more than four years after the note was given. Was such demand in time to fix the endorser?

MR. WARD, appearing for the claimant; and MR. MEDDAUGH, for the assignee.

LONGYEAR, J.—I fully concede that there is much force and great weight in the reasoning of the register in his able opinion, and if this were a new question I should be much inclined to concur in his views and conclusions as to the nature and character of a promissory note like the present, on interest, and payable on demand, and the relative rights, liabilities and disabilities of the holder and endorser. But this question is not only not a new one, but I consider the law so well settled in this country by an almost unbroken current of decisions in nearly every state and in some of the federal courts, in opposition to the view so ably expressed by the register, that so far as this court is concerned I can hardly consider the question an open one. I feel the more constrained to follow the current of decisions upon this question, from the fact that the supreme court of this state seems to have adopted it, *Carl* v. *Brown*, 2 Mich. 401, deeming it, as I do, of the utmost importance that the law, especially so far as it relates to commercial paper, should be uniform in all the courts within the same jurisdiction.

The doctrine, as thus settled, I deem to be, that such a note as is above described must be presented for payment within a reasonable time to charge the endorser. Parson, Notes and Bills, 263-269, and the numerous cases there cited.

In this case the note was made and endorsed October fourteenth, eighteen hundred and sixty-five, and no demand was made until December twenty-third, eighteen hundred and sixty-nine, more than four years having elapsed. Every

one must concede that this was not a demand within a reasonable time so as to charge the endorser under the law as above stated.

I must therefore non-concur in the conclusion of the register, and hold that the liability of the bankrupt as endorser never became fixed, and that the said claim must be disallowed.—January 9, 1871.

U. S. DISTRICT COURT—N. D. OHIO.

Where the original consideration of a claim passed to a partnership, but the obligations given for the same were executed by the individual members of the firm as such,

***Held*, that the creditors holding such obligations are entitled to a credit out of the individual estates.**

In re THE BUCYRUS MACHINE CO.

I, Henry C. Hedges, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me, the following question arose pertinent to the said procedings, and was stated and agreed to by counsel for the opposing parties, to wit:

Mr. E. B. Finley, who appeared for A. C. Shock, one of the creditors of Henry Stuckey, one of the said bankrupts, and S. R. Harris, Esq., who appeared for Ballard, Fast & Co. and other creditors in the same class, and said E. B. Finley, on behalf of said A. C. Shock anticipating a dividend, would be speedily declared among the creditors of said bankrupts, excepts to any dividend being declared to Ballard, Fast & Co. and other creditors of the same class, out of the separate estate of Henry Stuckey, bankrupt, until all the individual creditors of said Stuckey are first paid; that Ballard, Fast & Co. and other creditors of the same class are not individual creditors of said Stuckey. Mr. Harris insists that Ballard, Fast & Co. and other creditors of the same class are individual creditors of Stuckey, and are entitled to a dividend out of the separate individual estate of said Stuckey.

Said parties agree that the *original consideration* of the now existing claim of Ballard, Fast & Co. and the other creditors of said class *passed to the partnership firm*, the Bucyrus Machine Co., but that the obligations given and accepted, and now existing, were executed by said Jacob Poundstone, Henry Stuckey, Elias Miller, George Burkhart and William H. Burkhart *individually*, and *not* by the *partnership name* of The Bucyrus Machine Co.

I am of the opinion that said Ballard, Fast & Co. and others of the creditors of the class, holding the paper executed by said Poundstone, Stuckey and others by their individual signatures, although the original consideration passed to the partnership, must be taken and held to be *individual* creditors of each of said bankrupts, and as such, entitled to any dividend declared out of the separate estate of each bankrupt, to the extent that such dividends do not more than equal the entire proven claim; that said bankrupts, in executing obligations, elected to bind their separate estates, and as against such creditors cannot now insist that the consideration originally passing shall be inquired into, and that third parties, A. C. Shock & Co., cannot require Ballard, Fast & Co. and the creditors of that class to be turned over to the partnership estate, and so holding, the exception of said A. C. Shock is by me overruled.

And said parties request said question to be certified to the district judge, for his action thereon, which is done accordingly.

HENRY C. HEDGES, *Register*.

S. R. HARRIS, attorney, &c., assented to the opinion of the register.

E. B. FINLEY, attorney, &c., dissented to the opinion and action of the register as above.

SHERMAN, J.—The above opinion of the register on the question stated by him is hereby affirmed, and the assignee is ordered to make the distribution accordingly.—May 13, 1871.

UNITED STATES CIRCUIT COURT—RHODE ISLAND.

[JUNE TERM, 1871.]

The United States district court does not possess the power under the twenty-fifth section of the present bankrupt act, to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner.

KNIGHT v. *CHENEY.*

CLIFFORD, J.—District courts are constituted courts of bankruptcy by the act of congress establishing the existing system upon that subject, and the provision is, that those courts shall have original jurisdiction in their respective districts in all such matters and proceedings, and they are authorized to hear and adjudicate upon the same according to the provisions of the bankrupt act. 14 Stat. at Large, 515. Such courts are considered as always open for the transaction of business under that act, and the first section also provides that the powers and jurisdiction therein granted and conferred may be exercised as well in vacation as in term time, and that a judge sitting at chambers shall have the same powers and jurisdiction as when sitting in court. Provision is also made by the same section that the jurisdiction conferred by the act shall extend to all cases and controversies arising between the bankrupt and his creditors; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties, and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and the due distribution of the assets among all the creditors. Superadded to that clause is the further provision that the jurisdiction shall extend to all acts, matters and things to be done under and in

virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy.

On the fifth of October, eighteen hundred and sixty-eight, Josiah D. Hunt, of Providence, in this district, on the petition of his creditors, previously filed in the district court, was adjudged bankrupt, and the record shows that the respondent before the court was, on the twenty-fourth of the same month, duly chosen assignee of the bankrupt's estate. Due assignment of all the bankrupt's estate was also made to the assignee on the day of his appointment. Subsequently the assignee claimed a large stock of merchandise in the possession of a certain firm doing business in the city of Providence, and the parties in the possession of the goods refused to deliver the same, claiming to hold the goods in full property as purchased from the bankrupt, and thereupon the assignee presented a petition to the district court praying that a citation might issue to that firm and to the several persons composing the same to appear and show cause why the pretended sale and transfer of the merchandise should not be adjudged void. His representations were that the sale and transfer were not made by the bankrupt in the usual and ordinary course of business; that the transfer was made by a gross bill of sale, without any enumeration of the articles; that the bill of sale was executed on the second of September next before the grantor was adjudged bankrupt; that the goods were removed from his possession on the following day, and that the purchasers had reasonable cause to believe that the grantor was insolvent, or that he was acting in contemplation of insolvency and in fraud of the provisions of the bankrupt act.

Amendments were subsequently made to the petition by which the present petitioner and one David Millard were made parties respondent to that proceeding. They were severally made parties, for the reasons assigned in the first amendment, which are as follows:

1. That the present petitioner was at that time under

large liabilities on account of the bankrupt; that the bankrupt within four months before the petition in bankruptcy against him was filed, being insolvent or acting in contemplation of insolvency, paid, with the knowledge and acquiescence of the petitioner, the sum of eight thousand dollars in discharge of those liabilities, with a view to give the present petitioner a preference over other creditors of the bankrupt, he, the present petitioner, having reasonable cause to believe that the party making the payment was insolvent, or was acting in contemplation of insolvency, and that the payment was made to prevent the same from being distributed under the bankrupt act.

2. That the purchasers of the goods gave the bankrupt a money check for the sum of twenty thousand dollars as payment for the goods sold, and that the bankrupt put the same into the hands of the other respondent named in the amendment, with directions to apply the proceeds to the payment of the debts of the bankrupt then outstanding, and upon which the present petitioner was liable as surety, and that the payment, transfer and conveyance of the same were made with a view to give a preference to the petitioner in this case, and with the knowledge and under the same circumstances as set forth in the charge against the other respondent. Payment of the proceeds of the check as directed by the bankrupt, is also alleged, and that the other respondent was also a creditor of the bankrupt, and that he applied the proceeds of the check in whole or in part, to the payment of the amount due to himself as such creditor. Based on these representations, the prayer for relief is, that each respondent may account to the petitioner as such assignee, for the stock of goods or for the proceeds of the money check, and that they may deliver and pay over the same to the said assignee. Certain other proceedings took place in the case not material to be noticed, and on the twenty-third of August, in the same year, the present petitioner filed a motion to dismiss the petition of the assignee, upon the ground that the district court, in that form of proceeding, had no jurisdiction to hear

and determine the matter in controversy, but the district court being of a different opinion, overruled the motion on the day it was filed and entered a decretal order directing the petitioner for revision to answer the allegations of the assignee's petition. Dissatisfied with that decision and decree, the respondent, in that proceeding, filed the present petition in the circuit court, and prays that that decision and decretal order may be revised and reversed. Examined separately, the language of the first section of the bankrupt act would furnish some support to the theory of the assignee, that all the powers and jurisdiction of the district courts when sitting as courts in bankruptcy may be exercised on petition in a summary way, first giving notice to the party opposed in interest to the prayer of the petition, as in a rule to show cause in a proceeding of common law or in a suit in equity. Support to the same theory in respect to the powers and jurisdiction of the circuit courts in cases and questions arising under the bankrupt act, may also be derived from the first clause of the second section of the same act, if that clause of the section is examined without any reference to the constitution, and the other provisions of the bankrupt act, which show to a demonstration that such a theory is erroneous. Circuit courts, by the very terms of the same section, also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to or vested in such assignee, provided the suit at law or bill in equity shall be brought within two years from the time the cause of action accrued. 14 Ibid 518. Controversies, in order that they may be cognizable under that clause of the section, must have respect to some property or rights of property of the bankrupt, transferable to or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against

the other as appears by the express words of the provision. All three of the conditions must concur to give the jurisdiction, but where they all concur, the party suing may, at his election, commence his suit either in the district or circuit court, and if in the former, it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the circuit court for re-examination by writ of error if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damages claimed amounts to more than five hundred dollars, and the writ of error is seasonably sued out or the appeal is claimed and the required notices are given within ten days from the rendition of the judgment or decree.

Suits in equity, between such parties in the case therein described, as well as actions at law, may be commenced and maintained in the district courts, and it is clear that final decrees in such suits in equity, as well as final judgments in such civil actions where the debt or damages as claimed amount to more than five hundred dollars, may be re-examined in the circuit courts, and that the final decrees and judgments rendered in the circuit courts in such cases where the sum or value exceeds two thousand dollars, may be re-examined in the supreme court by appeal or writ of error, as provided in the judiciary act and the act allowing appeals in cases of equity and of admiralty, and maratime jurisdiction. 1 Stat. at Large, 84; 2 ibid, 244.

Where the debt or damages claimed in such a case do not exceed five hundred dollars, and the suit, whether it be a suit at law or in equity, is commenced in the district court, the better opinion is that the judgment or decree of that court is final and conclusive, as it is clear that no such judgment or decree of the district court is subject to revision by the circuit court under the power conferred by the first clause of the second section of the bankrupt act. Attempt is made to show that the construction here given to the third clause of that section, is inconsistent with the language of the first clause, but the court is of a different opinion, as the

power of general superintendence and jurisdiction conferred by the first clause does not extend to cases where special provision is otherwise made, as such cases are in express terms excepted from its operation. Undoubtedly it extends to all cases and questions where special provision is not otherwise made, as the further enactment is that the circuit courts may, in the cases not falling within some special provision, "upon bill, petition or other proper process of any party aggrieved, hear and determine the case as in a court of equity." Such revision is evidently to be of a summary and special character, as sufficiently appears from the words "general superintendence" preceding and qualifying the word "jurisdiction," and more clearly from the fact that the power to revise, as there conferred, extends to mere questions as well as to cases, and to every interlocutory order in the proceeding, except where special provision is otherwise made, and also from the language of the second clause of the section that the powers and jurisdiction therein granted may be exercised, either by said court, or by any justice thereof, in term time or vacation. Appeals in cases under the third clause of the section are too late, unless the appeal is claimed and the required notices are given within ten days from the entry of the decree in the district court, and the act of congress does not give the circuit courts any power to enlarge the time.

None of those provisions, however, apply to petitions for revision under the first clause of the section, nor does the bankrupt act fix any precise limitation to the right of an aggrieved party to file such a petition in the circuit court. Power to revise all cases and questions which arise in the district courts in such a proceeding "except when special provision is otherwise made," is conferred upon the circuit courts, but the court here is of the opinion that the power conferred by that clause does not extend to any case where special provision for the revision of the case is otherwise made, as where it is provided that an appeal or writ of error will lie from the circuit court to the district court in manner

provided in the laws of congress allowing appeals and writs of error.

Special provision is made for the revision in the circuit court of controversies like the one before the court, and for several other classes of controversies, and the opinion of the court is that such causes of action cannot be determined by the district courts in a summary way without due process of law, subject, perhaps, to one or two exceptions of a special character. Such controversies must be determined by suit in equity or by an action at law, as the case may be, and where an action at law is the proper remedy, the parties are entitled to a trial by jury, if "the value in controversy shall exceed twenty dollars." Cases of the kind before the court, fall directly within the third clause of the section under consideration, and where the property in controversy at the time the debtor was adjudged bankrupt, was in the actual possession of a third person claiming absolute title and dominion of the same, the question of ownership, if the same is claimed by the assignee of the bankrupt, must be determined by a suit in equity or by an action at law, subject to re-examination as provided in the law of the forum where the suit is commenced.

Concurrent jurisdiction in such cases is certainly vested in the circuit and district courts, and it is equally clear that either party, in a proper case, may remove the cause into the supreme court for re-examination, as provided in other controversies outside of the bankrupt act. Strong support to that conclusion may also be derived from the several special provisions of the act referred to in the exception contained in the first clause of the second section, as they show that judgments or decrees rendered in such cases cannot be revised by the circuit courts under the summary power conferred by the first clause of that section.

Plain and well supported as these several propositions appear to be, still it is contended that the twenty-fifth section of the act shows that they are all erroneous; that the district court possessed in this case full power to direct the peti-

tioner in revision to appear for the purpose specified in the citation and to order that the goods should be sold, and that the proceeds should be held in place of the goods, as the measure of value in any subsequent controversy between the parties.

Perishable estate of the debtor may be sold by order of the district court under the direction of the messenger or assignee, the fund received to be held in place of the estate sold, and the provision is made in case the estate of the debtor is liable to deterioration in value. Corresponding provision is also made in respect to the estate of the debtor which has come into the possession of the assignee, *or which is claimed by him*, where it appears to the satisfaction of the court that the title to the same is in dispute, and the enactment is that "the court may, upon the petition of the assignee," after reasonable notice to the claimant, his agent or attorney, "order it to be sold under the direction of the assignee," the funds received to be held in place of the estate, as in the case of the sale of perishable property.

Discretionary power, it must be conceded, exists in the district court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee and that it remained in his possession at the time the sale was ordered. Grant that the power of sale under that section, extends to such a case as that supposed, still the concession does not sustain the decision of the district court under revision, as the estate in this case was never transferred to the assignee, and was not in his possession at the time the order of sale was passed. On the contrary, it was in the actual possession of the respondent firm, claiming absolute title to, and dominion over the same as their own property. Responsive to that suggestion, the proposition of the assignee is, that the estate in question is also claimed by him as such assignee, and that the power of sale under that provision extends to any portion

of an estate, the title to which is in dispute, where the same is claimed by the assignee as in this case. Taken literally the phrase, "or which is claimed by him," would perhaps appear to afford some support to the theory of the assignee, but it is impossible to adopt that view, as it would authorize the district judge in the settlement of the estate of a bankrupt, however small, to order the sale of the estate, if claimed by the assignee, of every inhabitant of his judicial district, and to direct the assignee to hold the funds received from the sales in place of the estates sold, and to compel the owners in possession of the same to appear in court and vindicate their titles, and to accept, if successful, the proceeds of the sale as the value of their property.

Adopt that theory, and the constitution which was ordained to establish justice, becomes a mockery, as any man may be deprived of his property without due process of law, and no man, where the title to property is concerned, is entitled to a trial by jury, unless he commences his action "before the court orders the sale." Such a theory as applied to the facts of this case is not only repugnant to the constitution, but also to many of the other provisions of the bankrupt act, and especially to the third clause of the second section of the act, which contemplates that such controversies shall be prosecuted by an action at law or a suit in equity, and gives concurrent jurisdiction to the circuit and district courts to hear and determine the same as provided in the judiciary act. Appellate jurisdiction as exercised under the twenty-second section of the judiciary act, is not conferred upon the circuit courts in any case under the bankrupt act, where the ruling, order, decision or decree of the district court is made or rendered by that court in a summary way. All such rulings, orders, decisions or decrees must be revised, if at all, under the first clause of the second section of that act, as before explained; but there are four classes of cases where appellate jurisdiction, as exercised under the judiciary act, may be exercised by virtue of the powers conferred by the bankrupt act. They are as follows:—

FIRST. By appeal from the final decree of the district court in suits in equity, commenced and prosecuted in the district court by virtue of the jurisdiction created by the third clause of the second section of the act.

SECOND. By writ of error sued out to the district court in civil actions finally decided by that court in the exercise of the jurisdiction conferred by the same clause of that section.

THIRD. By appeal from the decision of the district court rejecting wholly or in part the claim of a creditor as provided in the sixth section of the act.

FOURTH. By appeal from the decision of the district court allowing such a claim, where the same is opposed by the assignee. *In re* Alexander, 3 N. B. R. 6.

Obviously the first two provisions are supererogatory, if the theory of the assignee is correct, as he has nothing to do in any case where he claims the estate but to apply to the district court to order a sale of the same if he can satisfy the district judge that the title to the same is in dispute. For these and many other reasons which might be given, the theory of the assignee must be rejected, but it is equally clear that the phrase "or which is claimed by him" cannot be rejected as surplusage, nor can the language employed be treated as without meaning. Those words are not contained in the fifty-fourth section of the insolvent laws of Massachusetts, from which the provisions in other respects was substantially borrowed. Similar provision is there made where it appears that the title to any portion of an estate which has come into the possession of the assignee, is in dispute, and that the property is of a perishable nature or liable to deteriorate in value, but the words "or which is claimed by him" are not contained in the section. Gen. Stat., Mass. 588.

Beyond doubt that phrase was incorporated into the bankrupt act for the purpose of enlarging the power of sale as compared with the corresponding provision in the state law. Although the title to the estate is in dispute, still the case would not fall within the state law unless the estate in

question had "come into the possession of the assignee," but the provision of the bankrupt act authorises the sale, though the estate may not have come to the possession of the assignee if it is claimed by him and the title is in dispute, as where personal estate is found in the hands of a mere depositary, carrier or bailee for safe keeping or transportation, without claim of title or interest in the goods, or what more frequently occurs, where personal property is subsequently discovered in the possession of the bankrupt, which was not transferred to the assignee, and in other cases of like character, other examples might be put, but those mentioned, it is believed, will be sufficient to show that the power of sale even as enlarged by incorporating that phrase into the provision, does not extend to a case where the estate in question is in the actual possession of a third person holding the same as owner, and claiming absolute title to and dominion over the same, whether the title and possession were derived from the debtor or any other former owner. Construed in this way, the phrase in question is perfectly consistent with the other provisions of the bankrupt act, and entirely reconcilable with the provisions of the constitution which ordain that no person shall be deprived of property without due process of law, and that the right of trial by jury, where the amount in controversy shall exceed twenty dollars, shall be preserved in suits at common law; but if the theory of the assignee is adopted, the phrase in question completely supercedes the third clause of the second section of the bankrupt act, and all the provisions of the act to carry that clause into effect, and is in direct conflict with two of the great safeguards of the constitution. *In re* The New York Kerosene Oil Co., 3 N. B. R. 31; *in re* Bonesteel, 3 N. B. R. 127.

Opposed to that conclusion is the suggestion that the eighth section of the former bankrupt law contained a provision precisely similar to the third clause of the second section of the present act; but the decisive answer to that suggestion is, that the sixth section of the prior act provided that the

jurisdiction of the district court in all matters and proceedings in bankruptcy arising under the act should "*be exercised summarily*," and that the district court should be deemed always open for that purpose. 5 Stat. at Large, 445.

Appeals to the circuit court, except by the bankrupt where he was refused a discharge, were not authorized by that act, but the decision of the district court in all other cases, though made in a summary way, was final and conclusive, unless the district judge, in his discretion, saw fit to adjourn some point or question into the circuit court for the same district. *Ex parte* Christy, 3 How. 317.

Controversies, such as are described in the third clause of the second section of the bankrupt act, if prosecuted in the district court by a suit in equity, and the debt or damages claimed is more than five hundred dollars, may be appealed into the circuit court, or if prosecuted by action at law, may be removed into that court by writ of error, and there are many other differences between the old law and the one now in force, which show that the rules of construction adopted by the courts in cases arising under the prior act, are not applicable to the provisions of the present law.

Every point and question arising in the administration of the law might, in the discretion of the district judge under the prior act, be adjourned into the circuit court to be determined there in a summary way, but it is clear that cases where special provision is otherwise made, cannot be revised by the circuit court under the first clause of the second section of the law now in force. Objection may be made that if the construction adopted is correct, then no revision can be had in that class of cases where the debt or damages claimed does not exceed five hundred dollars, but the conclusive answer to that objection, if made, is that congress possesses the sole power to determine whether or not an appeal shall be allowed, and in what cases the judgment or decree of the subordinate court shall be final and conclusive. *Ex parte* Christy, 3 How. 317.

Unquestionably congress might provide that a decree in

equity rendered in the district court should be revised in the circuit court in a summary way; but it is clear to a demonstration that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in that way, as the constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law."

Two modes only were known to the common law to re-examine such facts, to wit, the granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. 2 Story on Const. (3d ed.) 584; *Parsons* v. *Bedford et al.* 3 Pet. 448.

Congress could not provide that a judgment of the district court, founded upon the verdict of a jury in a civil action, whether for a less or greater sum than five hundred dollars, should be revised in the circuit court *in a summary way*, and inasmuch as suits in equity, such as are mentioned in the third clause in the second section of the bankrupt act, are placed in the same category as actions at law, the court is of the opinion, as no provision for appeal is made where the debt or damage claimed does not exceed five hundred dollars, that it was the intention of congress that the decrees of the district court in such case should be final and conclusive.

Viewed in any light, the court is of the opinion that the district court does not possess the power under that provision to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person, holding the same as owner and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some other former owner.

The decision and decree of the district court is reversed.

UNITED STATES DISTRICT COURT—NEW JERSEY.

Where a debtor gave to his creditors several bonds with warrants of attorney to confess judgments, for money lent in good faith, when neither the borrower or lender had reasonable cause to believe that the debtor was insolvent or intended any fraud upon the provisions of the bankrupt act,

Held, that judgments subsequently entered thereon, within four months of the date of filing petition in bankruptcy, and where both the debtor and the creditors had cause to believe the debtor to be insolvent, and intended a fraud upon the provisions of the act, were fraudulent preferences.

The case of J. B. Wright, 2 N. B. R. 155, considered and overruled.

In re F. C. LORD.

NIXON, J.—This matter comes before the court upon a rule taken by the assignee of the bankrupt, upon certain judgment creditors to show cause why the judgments held by them against the property of the bankrupt should not be set aside as fraudulent preferences, and that the money arising from the sale of said property, by the sheriff, should be paid to such general creditors as had proved their claims according to the provisions of the bankrupt act.

From the testimony taken in the case these facts seem to exist.

A petition for adjudication in bankruptcy was filed against the bankrupt on the eleventh day of January, eighteen hundred and seventy, and such proceedings were had thereon that he was adjudged a bankrupt on the sixteenth day of February following.

At the time of filing the petition there were eight judgments outstanding against the alleged bankrupt, entered in the circuit court of the county of Burlington, upon which executions had been issued, and levies made upon the property of the defendant, more particularly stated hereafter.

Upon petitions and proofs filed, the court directed an injunction to issue, restraining the plaintiff and the sheriff of Burlington from all proceedings upon the said executions, and ordered the property levied upon to be sold clear of encumbrance, leaving the judgment creditors the right to show before the court, why the proceeds should be applied to the

payment of their judgments in the order in which their liens attached.

We learn from the testimony taken in the case, that the bankrupt commenced business as a country merchant in the villiage of Marlton in the county of Burlington, about the first of March, eighteen hundred and sixty-four; that his capital did not exceed six hundred dollars; that on the fifth of February preceding, and before he purchased his stock of goods or opened his store, he borrowed of his brother, Wm. R. Lord, two thousand dollars, and gave to him, as evidence of his indebtedness, a bond for the payment of said sum in one year after the date, with interest payable half yearly, and at the same time executed to him a warrant of attorney, authorizing him to confess judgment thereon for the debt due upon his failure to pay the same; that on the fourth of March, eighteen hundred and sixty-four, he borrowed of Thomas Evans, Jr., six hundred dollars, and on the twenty-second of the same month, five hundred dollars more; and on the first of October following, one thousand dollars more; for which sums he executed to the said Evans, like bonds with warrants of attorney to confess judgments; that on the first of March, eighteen hundred and sixty-five, he borrowed of his brother, Wm. R. Lord, eight hundred dollars, securing the same by bond with warrant of attorney to confess judgment; that in the summer of eighteen hundred and sixty-eight, finding himself unable to pay his bills in Philadelphia as they became due, he borrowed of his brother the further sum of one thousand dollars, giving to him his note due in six months for the amount; that when the note became due he was unable to pay the same, and executed to his brother, on the twenty-fifth of January, eighteen hundred and sixty-nine, another bond with warrant of attorney to secure said debt, but, by mistake, dated the same January twenty-fifth, eighteen hundred and sixty-eight; that on the twentieth of December following, when his brother was entering his judgments upon these bonds, the error in the date of this bond was discovered, and in order to correct it, and to have some

allowances for payment made, a new bond was executed for the sum due upon this defective bond, and judgment entered upon the new bond after the surrender of the old one; that the three judgments held by the said Wm. R. Lord, against the said bankrupt, were entered upon the twentieth of December, eighteen hundred and sixty-nine, upon the said three several bonds executed to him at the time and upon the consideration aforesaid; that the three judgments held by the said Thomas Evans, Jr., against the said bankrupt, were entered upon the twenty-first day of December, eighteen hundred and sixty-nine, upon the three several bonds executed to him at the time and upon the considerations aforesaid; and that no question has been raised against the good faith of these transactions, and no doubt suggested, but that the said several sums of money had been loaned according to the allegation of the judgment creditors, and the admission of the bankrupt.

The two remaining judgments in favor of Higgins, Vanaman & Bell and P. H. Medara & Co., against the bankrupt, were entered on the eighteenth day of December—two or three days respectively before the judgments of Lord and Evans, and inasmuch that the results of the questions involved in this case very much depend upon the facts and circumstances attending the giving and entry of those judgments, it is necessary to give to these facts and circumstances a most careful consideration.

The evidence shows that previous to the month of December, eighteen hundred and sixty-nine, the bankrupt had difficulty in meeting his bills, notes and checks as they matured; that during the last year especially his paper was allowed to go to protest, but as this is not unusual amongst country traders and dealers of small means, with whom the chief significancy of a protest is the fee of the notary, and who are compelled to trust out their goods to their neighbors upon long credit; no particular apprehension seems to have been excited amongst his creditors on account of these failures to pay. His brother William talked of taking an interest in

the business with him, but was not willing to do so as long as these unpaid bills were outstanding. He states in his testimony (p. 73) that the bankrupt was at his house about December fifteen, eighteen hundred and sixty-nine, and that he (William) told him that he should see his creditors, and see what arrangements he could make, and try to get an extension for a year; and that Franklin advised him by letter, on the eighteenth, that he had written to all his creditors for such extension. Thomas Evans, Jr., also admits that the bankrupt talked with him about the partnership with his brother, and of the necessity which existed to have a year's extension for the payment of his debts. Franklin, himself, testifies that on the Wednesday before the seventeenth of December, he addressed a letter to each of his creditors, informing them of his proposed partnership with his brother and asking them to allow to him an extension of one year for the payment of the debts which he then owed to them. Two of these letters have been made exhibits in the case, and are as follows:

MARLTON, Dec. 16, 1869.

DEAR SIR: I am compelled to ask a favor from all of my creditors, and that is, will you sign off with all the rest? If you will, all right; if not, *I shall be compelled to stop business.* I have a brother that will come in partnership with me, if you will all sign off for that length of time. He has money, and all the goods we buy will pay cash for them. Please let me hear from you soon and I will come and see you. Yours truly,

F. C. LORD.

The effect upon the creditors of such a letter might have been anticipated. It was an acknowledgment of legal insolvency. It was a confession, of what most of them knew before, that he was not able to pay his debts in the usual course of business as they became due. A race of diligence commenced and they crowded in upon the debtor in hot haste, to get security for their claims. Let us hear the bankrupt's graphic account of what took place. He says, on page 11, "I wrote to all my creditors that my brother and myself expected to go into partnership on the first day of January, eigheeen hundred and seventy. That was on the

Wednesday before the seventeenth of December. I asked them for an extension of one year, until I could get time to collect by bills up and settle with them. Charles Jones, one of the firm of P. H. Medara & Co., was the first man who came to see me; he came just before night, on December seventeenth; he asked me the state of my affairs, and if my brother was endorsing for me, or would endorse for me; I told him I did not know; had not asked him. He said he was willing to give me the year if I would give him a judgment bond; I refused; told him I did not want to give any bonds; would see my brother and see what he thought of it. Jones told me it would do no hurt, no one would know how we settled, and I should tell no one how we settled, and that he would hold them for one year and longer if I wanted. When I consented, I gave him the judgment bond or signed it; I told him if he would give me a receipt not to use it for one year unless other creditors pushed me, I would make it. If others pushed me, I was to notify him, and he was to have the privilege to go on with his bond; and he gave me such a receipt; said he had received my letter asking for an extension written on the Wednesday before, and that had brought him there; he said he did not want me to stop business, and hoped I would get through all right. About fifteen minutes after he left, Vanaman and Bell, of the firm of Higgins, Vanaman & Bell, came to me and talked over the matter; I told them I gave Jones, of Medara & Co., a statement and what it amounted to. They told me they would be willing to settle with me the same as the others had done; I told them if they would give me a receipt of the same time, I would. They drew up the bond and I signed it, and they gave me the receipt; they stayed and took supper and went home. Vanaman and Bell also said that they had received my letter to them, and that that had brought them there.

"Q.—When did you first hear that these persons had entered judgment against you?

"A.—On the following Monday morning, December twentieth.

"Q.—After you had given these bonds as before stated, did you see any of your other creditors, and what occurred?"

"A.—I did see them. The first man came next day and was John Iszard, of the firm of Smith & Iszard. Iszard asked me what I had done; if any of my creditors had been to see me. I told him they had. He asked me what they had done. I told him the way I had settled with the two parties who came before. He said he would be willing to settle in that way for their book account, but the balance on the check I owed them, he thought I ought to pay in cash. I told him I could not do that; I had not the money. The balance on the check was for one hundred and the book account for thirty-eight or thirty-nine dollars. After we talked awhile, he said he would take the judgment bond for the whole amount. He or I drew it up, and he gave me the same kind of receipt as the others gave. Then after I gave him the bond, I promised him, that if nothing happened, I would pay him the balance on the check on the next Wednesday week, and that he should endorse the balance on the bond. He said he would hold the bond and do nothing with it unless other parties did; I saw the salesman of Chandler & Hart, by the name of Paul; came while Iszard was there. After Iszard got through we went back to the desk. I gave him the same statement I gave Jones, as near as I can recollect. He said their firm was willing to do what the others did, and I gave them a bond and took the same kind of receipt as I gave the others. Several other creditors came there but I did not see them."

The bonds thus executed by the bankrupt to his creditors were due at once; were given partly for open book account, and partly for outstanding promissory notes which were not yet due, and the warrant of attorney accompanying them, authorized an immediate entry of judgment upon them. The receipts which the bankrupt demanded and received when he executed the bonds have been made exhibits, and are in the words following:

"RECEIVED, Marlton, December seventeenth, eighteen

hundred and sixty-nine, of Mr. F. C. Lord, his judgment bond, * * * * being in full for bills to date * * * and guarantee, not to force the bond under one year unless other parties should push F. C. Lord before that time," which receipts, when interpreted by the testimony and the acts of the parties, simply mean that by virtue of these bonds and warrants of attorney, they had obtained a preference over other creditors, which they meant to maintain and hold at all hazards, but that they would give to the debtor one year in which to pay the debt, without forcing a sale of his property, unless, indeed, their priority should be in somewise endangered by some of the less fortunate creditors pushing for the collection of their claims, in which event they should not be expected by further delay, to lose their preferences.

It appears by the testimony of Evans, that on the evening of the seventeenth of December, after the execution of the bonds to Medara & Co., and Higgins, Vanaman & Bell, he went to the bankrupt's store and there received the information that the bonds had been given. He did not approve of the transactions, and told Lord that he had no business to have done it, and he feared that it would lead to trouble and difficulty. Before this, he says he had had no suspicion or anxiety about the business affairs of the bankrupt, but that now he began to feel unsafe in regard to his bonds and the position in which they stood, and resolved at once to send or take them to the clerk's office at Mount Holly, and have them recorded, thinking they were like mortgages and proper instruments to be recorded; that Lord came to his house on the Sunday evening following; that they had another talk over their affairs, and ascertaining that he was going to Mount Holly on the next day, he asked him to take his bonds to the clerk's office and have them put upon record; that Lord agreed to do so and took them home with him for that purpose; that he saw him again on Monday evening, when he returned to his house and said that the clerk had refused to record his bonds; that he had left them with F. Voorhees, Esq., who had sent a message to him that he

would have to come to Mount Holly the next day and qualify to them; that being unwell he was not willing to go unless the bankrupt would agree to take him; that Lord made the agreement and did take him on the next day; went with him to the lawyer's office and even paid the costs for the entry of the judgments against himself, which money, however, he states was afterwards refunded. He admits that before these judgments were entered, he had full knowledge that the two Philadelphia creditors and also Wm. R. Lord had entered judgment upon their bonds.

It also appears by the examination of Wm. R. Lord, that he was informed of the giving of these bonds to the Philadelphia creditors by letter, on the eighteenth of December, and by a personal interview with his brother on Sunday morning, December nineteenth; that he remonstrated with Franklin and was angry about it; predicted that he had done something which would break him up and at once resolved that he would have his own bond recorded; that he went to Mount Holly on Monday morning for that purpose, and there learned, at the clerk's office, that judgment had been entered upon two of the bonds which his brother had given to his mercantile creditors; that upon the recommendation of the clerk, his bonds were taken to the office of F. Voorhees, Esq., to be put into judgments; that whilst engaged in that business, Franklin C. Lord came there and ascertained what was going on; that at the suggestion of Mr. Voorhees, he executed to his brother a new bond for the one thousand dollar bond, bearing date January twenty-fifth, eighteen hundred and sixty-eight, and entered the judgment upon the substituted bond, and that these judgments were taken by Wm. R. Lord, as he informs us, because he understood that his brother was giving other bonds to other creditors.

This state of facts presents to the court the question whether, under the provisions of the bankrupt act, these judgments are valid liens upon the property of the bankrupt, or whether they should be set aside as fraudulent preferences and the proceeds of the sale of the estate levied upon be paid to the general creditors?

In considering it, we should first look at the intention of the law. It was designed to prevent preferences, by one insolvent or in contemplation of insolvency. In this respect it differs from the act of eighteen hundred and forty-one, which only avoided preferences given in contemplation of bankruptcy. Its object is as far as possible to insure the equal distribution of the property of persons in failing circumstances among all their creditors. But although preferences are odious in the eye of the law, it is not its policy to work injustice, in order to secure equality. All preferences are not illegal. Liens, honestly acquired, are upheld. Judgments, not tainted with fraud, and not confessed by those who are unable to pay their debts in the usual course of their business, to those who have reasonable grounds for believing that the debtor is insolvent, are protected. Let us apply these tests to the two judgments given by the bankrupt, and one to P. H. Medara & Co., and the other to Higgins, Vanaman & Bell, on the seventeenth of December, eighteen hundred and sixty-nine.

FIRST. Was Franklin C. Lord at that time insolvent?

This question must be determined by the evidence in the case, and considering that carefully, is there any real doubt of the fact that insolvency, legal and actual, then existed.

The bankrupt was not only unable to pay his debts in the ordinary course of business, as persons carrying on trade usually do, but there was an absolute inability to pay upon a settlement and winding up of his affairs. He exhibited a statement to his creditors on the seventeenth of January, eighteen hundred and seventy, one month after giving these judgments, and then his liabilities were over sixteen thousand dollars, whilst his assets were only about ten thousand dollars, and he testifies that there was no material change in his pecuniary condition between these dates.

SECOND. If the debtor was then insolvent, the legal result of giving the judgment was to give a preference, the law presuming that every man intends what is the necessary and unavoidable consequence of his acts. But we are not left to

presumption here. He writes to all his creditors on the day before he gave the judgments, in which he describes a condition of affairs which defines legal insolvency. No other interpretation can be given to his statements. His indebtedness is large; his debts have already been extended, are again due and pressing; he asks his creditors to allow him a further extension for one year, alleging that he must stop business unless they will agree to it.

The letter awakens their apprehensions and they act promptly. Instead of going into the bankrupt court, where all would share equally, they struggle for bonds with warrants of attorney to confess judgments, that each may secure a preference over the other. These bonds, authorizing an immediate entry of judgment, are given, to some, not to others, the bankrupt in each case requiring the creditor to sign a stipulation that he would not force their collection for a year, unless others should attempt to get their honest dues, which agreement or understanding admits of no other construction than this; that the debtor should give security by judgment to some of his creditors for their debts, in consideration of which the creditor would not compel the payment thereof for one year, unless by his delay he should lose his priority.

THIRD. Had these judgment creditors, when they took their judgments, reasonable cause to believe that the debtor was insolvent and that a fraud upon the provisions of the bankrupt act was intended?

His letter advised them of his insolvency, and was sufficient to put them upon inquiry. Their diligence in obtaining the judgments forcibly suggests the doubts and reveals the fears which they entertained respecting the safety of their claims. But aside from this, their own testimony seems to me to be conclusive upon this point. One of them (Jones) says that the judgment bond which he took was given in lieu of a note that was just falling due and which the bankrupt had notified them he would be unable to pay, and that he had in fact paid them no money on his indebtedness during the past year; that his notes had been renewed several

times, and that the debtor assured him that he expected to be able to pay all his debts, if his creditors would give him a year's extension. Had he not a reasonable cause for believing, nay, for knowing that his debtor was insolvent and that he was obtaining a preference in fraud of the bankrupt law, by demanding and taking a judgment bond due at once, and upon which, without delay, he acquired a lien upon the debtor's property? The other (Bell) states in his examination, that he visited the bankrupt, Lord, at Marlton, on the same day on which the firm received his letter, asking for the year's extension for payment of his indebtedness; that he was informed by him that he had already given a judgment bond to P. H. Medara & Co. to secure their claims; that he was satisfied after an inspection of a statement of his affairs rendered by the bankrupt that he was solvent unless he was forced to sacrifice his property, and that although a part of their debt was not due until the month of February following, he demanded security at once, and took a bond with a warrant of attorney to confess judgment thereon for the express purpose of acquiring a lien upon the bankrupt's estate.

The inference from this state of facts is irresistible; that he too had reasonable cause to believe that his debtor was insolvent, and that the inspiration of his conduct was an endeavor to get a preference over other creditors in the payment of his debts.

In considering the remaining judgments, three in favor of William R. Lord and three in favor of Thomas Evans, Jr., I shall look at them together as the principles by which their validity is to be tested apply to all of them alike.

Without adverting to the legal consequences of substituting a new bond for one previously given on the day of the entry of the judgments in favor of William R. Lord, and stating the matter most strongly for the judgment creditors, I am now to consider the case of six judgments entered by creditors upon bonds with warrants of attorney to confess judgments, given by the debtor when his solvency had not

been questioned, and held by the obligees until the debtor became insolvent and then entered up; executions issued thereon and levies made upon the debtor's property after they had reasonable cause to believe that he was insolvent, and that a fraud upon the law was intended.

Are such judgments fraudulent preferences?

In considering this branch of the case, I have been embarrassed by the apparently conflicting provisions of the thirty-fifth and thirty-ninth sections of the bankrupt law, and by the still more conflicting opinions of the different district and circuit court judges in their construction of them.

It was held by my predecessor, the late judge Field, *in re* J. B. Wright, 2 N. B. R. 155, that where the bankrupt, not being insolvent, borrowed money and gave a bond to the creditors with warrant of attorney to confess judgment, and they afterwards took a judgment thereon and made a levy with a knowledge of the debtor's insolvency, such judgment was good and should be paid out of the assets in court, being the proceeds of the sale of the bankrupt's personal estate. In other words, he seemed to interpret the transaction solely in the light of the provisions of the thirty-fifth section, and viewed it in reference to the condition and knowledge of the parties when the bond was executed and the warrant of attorney given, and not when the lien upon the bankrupt's property was acquired by the entry of the judgment and the levy of the execution. But does not this view overlook the provisions of the thirty-ninth section in reference to the recovery of property conveyed or transferred contrary to the act? These sections in this regard are *in pari materia*, and must be construed together. Admitting that the primary object of the thirty-ninth section is to define acts of bankruptcy in involuntary cases, yet does not it also expressly provide that if the person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, assigned or transferred contrary to said act, subject only to the condition that the person receiving the same had reasonable cause to believe that a fraud on the act was intended

and that the debtor was insolvent? If any effect is to be given to this clause of the thirty-ninth section, must we not hold that where a debtor stands by and suffers his property to be taken on legal process with intent to give a preference, the creditor having reasonable cause to believe that a fraud upon the act was intended and that the debtor is insolvent, the fruits of such judgment must be surrendered by the creditors either upon a suit brought by the assignee or upon summary proceedings, when, as in the present case, the parties have submitted themselves to the judgment of the court, and that the knowledge on the part of the creditor refers rather to the time when the lien was acquired than to the time when the bond, which is a mere evidence of the debt, and the warrant of attorney, were signed? It ought to be observed that, in the above case, judge Field rested his opinion mainly upon the decision of the supreme court, as rendered in *Buckingham* v. *McLean*, 13 How. 151, where the question arose under the bankrupt act of eighteen hundred and forty-one, the provisions of which, in this respect, materially differ from the act of eighteen hundred and sixty-seven; and further, that he expressly stated there was no evidence to show that the creditor, in entering his judgment, had any reasonable cause to believe that a fraud upon the provisions of the bankrupt law was intended.

I am glad to find that the view of the law which I am constrained to take, is sustained by the reasoning of his honor, judge McKennon, in the *conclusion* of the opinion delivered by him in the case of *Vogel* v. *Lathrop*, 4 N. B. R. 146. He says: "Another question remains, which, although it is not raised by any direct allegation in the bill, may, perhaps, be regarded as presented with sufficient distinctness in the bill and answer to call upon the court to consider it. It involves the right of the respondent to hold a lien upon the personal property seized under the executions issued on the judgments. By the thirty-ninth section of the bankrupt act, where any person being bankrupt or insolvent, procures or suffers his property to be taken on legal process with

intent to give a preference to his creditors, or with intent to defeat or delay the operation of the act, and shall be adjudged a bankrupt, his assignee may recover back the property so taken, if the person receiving it had reasonable cause to believe that a fraud on the act was intended and that the debtor was insolvent. Passive acquiescence in the seizure of his property in execution by an insolvent debtor when he could prevent it by going into voluntary bankruptcy, has been held to be suffering it to be taken with intent to give a preference within the meaning of the section. *In re* Black & Secor, 1 N. B. R. 81; *in re* Craft, ib. 89; *in re* Sutherland, ib. 140.

"But the facts here import more than inactive submission, if they do not amount to positive procurement on the part of the debtors. They confided to the respondent the secret of their embarrassment and insolvency, and thereupon gave him a judgment for the amount of other judgment indebtedness to him for the very purpose of protecting their surety and better securing the collection of the debts by a prompt seizure of their property in execution; while the plan was abandoned by the respondent upon his conceiving doubts of its efficiency, he immediately issued executions upon some of his other judgments and caused them to be levied upon the personal property of the defendants. Is there any room for doubt, then, that the debtors were moved by an intent to prefer the respondent's debt, and that the respondent was prompted by the debtor's information to seek a preference by an exclusive appropriation of their personal property to his judgments? Such is the clear significance of all the circumstances. But as the assignee might recover back the property seized, if it had been sold, the respondent cannot maintain the advantage thus apparently given and the property or its equivalent must go to the assignee."

Apply this reasoning to the facts in the case before us, Here are two creditors, who have, it is admitted, honest claims against their debtor for sums of money advanced to him at various times, to enable him to carry on his business.

As evidence of their debt, they hold bonds with warrants of attorney to confess judgment which give them no lien upon the debtor's property but are valuable, as enabling them at any hour to acquire one by judgment and execution. They hold them for years satisfied with their security, and having no suspicion that the debtor is not able to pay his debts. But the time comes when he is not able, and they know it. They know that he fails to pay his debts as they become due, in the ordinary course of business; that he sends notice to all his creditors; that he must have one year's extension or must stop; that he gives bonds with warrants of attorney to confess judgments to several of his other creditors, and that two of these had entered judgments against him, and that he suffers his property to be taken on legal process on executions in favor of these preferred creditors. With a knowledge of these facts imparted to them by the bankrupt, they first seek to record their bonds with the avowed purpose of putting them in a position where they will be paid in full. And when they learn that such is not the legal result of recording them, they procure judgments to be entered, executions to issue and levies to be made upon the whole estate of the debtor.

Can we doubt that the creditor had knowledge of the insolvent condition of the debtor, and that their intent was to get a preference in fraud of the provisions of the law? And how can the conduct of the debtor be explained, except upon the hypothesis that he intended a preference when he suffered his property to be taken under the execution issued upon judgments, to the entry of which he was privy—nay, the entry of which, I think it fair to say, he procured.

Under the bankrupt act of eighteen hundred and forty-one, the supreme court in the case of *Shawhan* v. *Wherritt*, 7 How. 644, held that after an act of bankruptcy had been commited by the debtor, of which the creditor had knowledge, he could not by proceeding in a state court obtain a valid lien and seize the property of the bankrupt to the exclusion of his other creditors. Such a proceeding was

considered a fraud upon the law, and void. It was further held, that acts of bankruptcy committed by the debtor were tests of insolvency, showing the inability of the debtor to pay his debts or carry on his trade; that the policy and aim of bankrupt laws were to compel an equal distribution of the assets of the bankrupt among his creditors; and that hence when a merchant or trader, by any of these tests of insolvency, had shown his inability to meet his engagements, one creditor could not, by collusion with him or by a race of diligence obtain a preference to the injury of others.

Such conduct was treated as a fraud upon the act, whose aim was to divide the assets equally and therefore equitably.

Adopting these principles as applicable in all respects to the act of eighteen hundred and sixty-seven, and recognizing the decisions of judge Blatchford, *in re* Black & Secor, 1 N. B. R. 81; of judge Hall, in *Beattie, assignee* v. *Gardner*, 4 N. B. R. 106, and of judge Woodruff, in *Smith, assignee* v. *Buchanan*, ib. 133, as the best expositions of the scope and spirit of its provisions, and considering all the facts of the case before me, I have no doubt that I ought to hold, and I do hold, that all of these judgments must be set aside as fraudulent preferences, and that the proceeds of the sale of the bankrupt's personal estate must go to and be held by the assignee for the payment of the general creditors.

MR. P. L. VOORHEES and MR. E. T. GREEN, for assignee and general creditors; MR. F. VOORHEES and J. WILSON, for judgment creditors.—July 25th, 1871.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

An endorser of a note who receives none of the proceeds of the same, and whose contingent never becomes an absolute liability, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder, and while he, the debtor, was still carrying on business.

BEAN, assignee, v. *LAFLIN.*

TREAT, J.—An incident pertaining to the misconduct of a juror, who, with full knowledge of the facts on the part of

counsel, was discharged from the panel, has not escaped the consideration of the court. It is not presented by counsel as a ground for setting aside the verdict, inasmuch as the trial proceeded by consent; yet it indicates a condition of mind in the jury box at that time exacting more than usual scrutiny into the conduct of the cause. It may be that no other juror was affected in like manner, yet it is essential to the purity of jury trials that they should be beyond reasonable suspicion of being controlled by prejudice.

The various facts and circumstances connected with Kintzing's composition deed, whereby the same became void, it was seemingly necessary to prove in order to establish his insolvency at the date of the payment in question; and a knowledge of some one or more of those facts by the defendant seemed to be also necessary to bring home to him "reasonable cause to believe" Kintzing insolvent. It may be that the court suffered that class of inquiries to be pushed too far. It was clear from one fact established, viz.: that Brookmire and Rankin received full payment and then caused their names to be signed to the composition deed—that the deed was actually imperative and void. Laflin knew the fact, although he may not have known its legal effect. It appeared also that all the other creditors did not assent thereto, for Hunt objected and threatened, and others state they had no knowledge thereof.

The composition deed being actually void, Kintzing was insolvent. While Kintzing was proceeding under the deed as if valid, the defendant put his name, in connection with *two* others, on a note to be discounted for the accommodation of Kintzing. Instead of becoming joint endorsers, they became joint makers, and as between them and Kintzing were merely his sureties. If the notes were not paid at maturity, no protest and notice were necessary to fix their liability to the holder. Each of the three joint makers would then have been justly liable *inter sese* for one-third of the amount; and if any one of them paid the whole, he would have been entitled to contribution from the others. In that

condition of affairs, Kintzing, for whose accommodation the note was made, paid the same at maturity to the holder, without consulting or referring in any way to the accommodation makers or sureties.

The suit was originally by Kintzing's assignee to recover back from those makers jointly the whole amount so paid, on the ground that the payment was for their benefit and in fraud of the provisions of the bankrupt act, and that they had reasonable cause to know the insolvency of Kintzing and of the fraud named. The suit now stands against Laflin alone.

Many difficulties arise as to the law of the case. It has been held by some judges that the payment before maturity by an insolvent maker of a note endorsed by a solvent person does not render the *holder* liable to refund. but does make the solvent *endorser* liable, because the payment was for "his benefit." To that ruling this court cannot assent. It is evident that the *holder* cannot be required to refund, for he could not refuse payment at maturity when tendered, and then protest and charge the endorser. The latter's liability is contingent, and until the note is dishonored and notice duly given, his legal liability is not fixed, and he cannot be legally called upon to pay. If, without any action whatever on his part, the insolvent maker pays the note at maturity, it is not easy to see how that payment is *in a legal sense* for his benefit, inasmuch as he never become *legally* liable to pay at all. To say that he *might* have become legally liable if certain contingencies had happened, which never did happen, does not alter the case. It suffices that he never was legally liable to pay, and that, through no procurement by him, his *contingent* never was converted into a present and absolute liability.

One of the main objects of the bankrupt act, it is true, is to secure equality among creditors of an insolvent, and the law covers to some extent debts not due and existing *liabilities;* but it must be construed in the light of the general laws obtaining at the date of its enactment, and also of its

own provisions with reference thereto. It does not contemplate that every endorser's contract shall be changed from what it was when made, merly because, by a subsequent event, viz.: the maker's insolvency, the latter cannot meet all of his obligations. That subsequent event does not of its own force convert a contingent into an absolute contract; does not dispense with non-payment, protest and notice. It is not to be held that the law merchant in that respect was designed to be thus wholly overturned.

It is apparent on the other hand that if an insolvent who has outstanding obligations, secured by endorsements, can pay some and leave others unpaid, then some of the endorsers or sureties escape and others not, and thus a preference is wrought. Look at the question as we may, serious difficulties must arise; yet all that courts can do is to follow in the paths the law directs. The *legal* fact exists, that an endorser's contract is *contingent*. Until his liability is fixed according to the terms of his contract, payment cannot be exacted from him. An attempt to force him to pay what he is not bound to pay, on the ground that without his knowledge or procurement the maker paid what he (the maker) contracted to pay, could well be met by the answer "*in hæc foedera non veni*"—such was not my contract.

This line of investigation might be pursued at great length; but enough is said to indicate the reasons which influence this court in its refusal to follow the decisions referred to. The bankrupt act is not to be construed as subversive of elementary principles pertaining to the law merchant or the universal law of contracts, except where its provisions plainly require such rulings.

The thirty-fifth section enacts that if a payment is made by an insolvent "with a view to give preference to any creditor or person having a claim against him, or *who is under any liability for him*," "the person receiving such payment" or *to be benefited thereby*," "having reasonable cause to believe such person is insolvent," and that "such payment is in fraud of the provisions of this act, the same shall be void," &c.

Does that section contemplate that an endorser who never receives a dollar, and whose contingent never became an absolute liability, shall pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder? This court cannot so hold. In one sense the endorser was *benefited* by the maker's payment, but not in the *legal* sense in which the act uses the phrase.

When other sureties exist and the debt is paid by the obligor at maturity, does not the same rule apply? The sureties' obligation is contingent, and if the debt is paid, at or before maturity, without any action on their part, how can it be said that they are made absolutely or immediately liable?

These remarks apply only to cases where sureties or endorsers take no action, or are innocent of all participation in any scheme by the principal debtor to contravene the law.

The case as now before the court presents still another difficulty. Where a payment made has to be refunded, no one is liable to refund unless he had "reasonable cause to believe," &c. Here were *three* sureties, each equally liable, contingently, and entitled to contribution, &c. *One*, it is contended, had reasonable cause to believe, but neither of the other two; and therefore he is bound to refund to the assignee the *whole* amount. His contract was, in a contingency which never happened, to pay to the creditor the amount with right of contribution from his co-sureties. If he is to be held to pay the whole, what becomes of his right of contribution? The theory is, that he has been benefited by the payment, and because *he* had "reasonable cause to believe," and the other sureties not, therefore they cease, practically, to be his co-sureties, and the contract, as to him, is converted into a new and distinct contract; he is made *absolutely* liable as *sole* surety on a *contingent* contract with co-sureties, notwithstanding the contingency never happened and he assumed no new obligation in the premises. It might well be that, knowing the maker's embarrassed condition, he was originally willing to sign the paper in connection with

others and share with them the probable loss. If the maker did not pay, the three would have to contribute equally. How is he to be compelled to pay the whole, and the others to be discharged? It is said, because the maker paid the demand, and by the new rule each who had reasonable cause to believe, etc., is converted into a surety absolute, and the co-sureties innocent of such reasonable cause are alone discharged. The case must be an extraordinary one, dependent on some active participation by a surety or endorser in a debtor's fraud, to justify any such ruling.

In this case the money obtained on the discount went to Kintzing and was used by him. He paid the note at maturity, without calling on his sureties. He continued in business for some time thereafter, on the hypothesis that his composition deed was valid, or would be permitted to stand. Finally it was ascertained that not only was the composition deed void, but that Kintzing could not comply with its terms. This suit is to obtain from the defendant, one of three sureties, the whole amount of a note discounted for Kintzing's benefit, and paid by him at maturity, without any interference by them to induce him so to act.

The views presented by Mr. Justice Miller as to the debtor's interest, under this act, must arrest the attention of courts and possibly of Congress. At any rate it does not conform to established rules of interpretation so to construe this act as to work a subversion of elementary and essential principles governing the laws of contracts, and hold parties to obligations they never assumed or contemplated; to make them also liable for acts done by others without any participation by them in the alleged wrong. Payments made *after* liability fixed presents a very different question.

These comments are made in full view of the many difficulties to spring up from whichever rule of construction is adopted.

As the ruling at the trial were not in accord with these views, a new trial will be granted.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A trader is insolvent within the meaning of the thirty-fifth section of the present bankrupt act when he is unable to pay his debts as they mature in the ordinary course of his business, and not merely when his liabilities exceed his assets.

A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same is paid.

Where a security by way of mortgage is given more than four months before bankruptcy, a change in the former substance of the deeds made within four months of the bankruptcy, will be protected if no greater value were put into the creditor's hands at that time than he had before.

A mortgage given when a debtor was insolvent and when his creditor had reasonable cause to believe him to be so, is void if made within four months of the filing of a petition in bankruptcy, hence money received from the sale of the mortgaged premises must be accounted for to the assignee.

SAWYER et al. v. *TURPIN et al.*

Two bills in equity by the assignee in bankruptcy of J. C. Bacheller, of Lynn, against Novelli & Co., of Manchester, England, and their agent in this country, E. Turpin, alleging that at certain times mentioned, and all within four months before the bankruptcy, Bacheller, being insolvent, made two mortgages of certain lands in Lynn, and a third mortgage of a house standing on leasehold land, and certain transfers of goods of the alleged value of twenty thousand dollars in gold, then in the bonded warehouses of the United States at Boston, to said Turpin as agent for Novelli & Co., with intent to prefer said last named defendants, they and their agent believing and having reasonable cause to believe that Bacheller was insolvent and intended a fraud on the act. The answers admitted that the mortgages were made as security for a large balance of account for goods sold, but denied all belief and reason to believe the insolvency of Bacheller, and averred that two of the mortgages were given instead of two earlier conveyances of the same property which had been made more than four months before the bankruptcy, and which were cancelled when these now in controversy were given. As to the goods, the answers admitted that transfers were made by Bacheller to Turpin as agent of his principals

on the books of the custom house, and set out the several dates thereof, and averred that the goods were on their way from Novelli & Co. to Bacheller when the sales were lawfully rescinded before the property had ever vested in Bacheller, and if the re-transfers were not valid, there was a right to stop the same goods *in transitu*, and that said goods had not been delivered to Bacheller at the time of his stopping payment.

The evidence tended to show that Novelli & Co. had for some years before July, eighteen hundred and sixty-eight, dealt largely with a firm of which Bacheller was a member, and when he began business by himself in eighteen hundred and sixty-eight he continued to send them large orders for goods such as he had always dealt in. The terms appear to have been that each invoice was to be remitted for within sixty days from its date.

Early in eighteen hundred and sixty-nine Bachellor was largely in arrears to Novelli & Co., and continued to be so until his failure. He stopped payment in September and filed his petition on the twenty-second of October, eighteen hundred and sixty-nine, the defendants appearing by his schedule to be creditors to the amount of about forty-one thousand dollars, and held the securities mentioned in the bills. All his other debts were about six thousand dollars.

It appeared that in April, eighteen hundred and sixty-nine, Novelli & Co. wrote to Turpin expressing their dissatisfaction with the state of Bacheller's account; and directing him on receipt of the letter to proceed at once to Boston and if there was still an overdue balance, "to induce, request or insist that he hands over to you as collateral security the notes and such other documents of value you can by any means obtain, to be held by you in safe keeping until such time as he can cover our overdue balance by remittance." They afterwards in the same letter say that they consider "the position of J. C. B.'s affairs are not, in a commercial point of view, satisfactory," and state their reasons. On receipt of this letter Turpin went to Lynn and saw Bacheller,

and obtained from him conveyances of the land on Bacheller street and of the shop on Exchange street, and a transfer of certain goods in the custom house as collateral security. And at the same interview it was agreed that all goods that should arrive thereafter should be warehoused in Turpin's name until they were sold by Bacheller, when Turpin should send withdrawal orders and Bacheller should sell the goods and remit the proceeds. This course of business was followed from that time, excepting that the remittances were made on account without special reference to any particular sales. Goods were so transferred to Turpin in May, June, August and September as they arrived, and were re-transferred by him as they were sold. When Bacheller stopped payment in September there were —— cases thus stored in Turpin's name, for a part of which he had sent on withdrawal orders which, on the failure, were sent back to him, and on the fourteenth of October he took the goods out of bond, paying the duties and charges, and caused them to be sold. At the time of his failure the bankrupt's debt to Novelli & Co. was as large as it was in May. On the twenty-seventh of July Bacheller handed to Turpin the mortgage of the house on Atlantic street as additional security. On the 31st of July Turpin brought the deeds which he had received in May to Mr. Bacheller's clerk, who was to have them recorded, and the clerk said that it would be better to make some change in their form and accordingly made out the mortgages which bear date thirty-first of July and were recorded in September. The delay for a month or more in recording the deeds was an oversight on the part of the clerk. The title to the Bacheller street property proved to be defective and the defendants realized nothing from that mortgage, so that the discussion was eventually confined to one mortgage of lands and one of personal property.

J. G. ABBOTT and B. DEAN for the plaintiffs.

1. Batcheller was insolvent in May and ever after according to the accepted definition; for he could not pay his

debts as they matured. *Thompson* v. *Thompson*, 4 Cush. 127; *Lee* v. *Kilbourn*, 3 Gray 594, and cases cited.

2. The defendants had notice of the insolvency, because their own debt was overdue, and they were unable to obtain payment. All the correspondence shows this to be so, and besides, they were obliged to take security on real estate for a balance which should have been liquidated as fast as it accrued.

3. The defence that the new mortgages were given in exchange for the old fails, because one was given for the first time July twenty-seven; another was for a bill of sale which was void, never having been recorded and no possession taken under it, and none of them were ever acted on.

4. All transfers of merchandise made within four months of October twenty-second are void, because they were given to secure an antecedent debt, when the debtor was insolvent and known to be so. The arrangement cannot be dated back to May, because a mere executory contract for security does not suffice. This has been repeatedly decided by the Supreme Court of Massachusetts. *Forbes* v. *Howe*, 102 Mass. 427; *Blodgett* v. *Hildreth*, 11 Cush. 311; *Paine* v. *Waite*, 11 Gray, 190; *Simpson* v. *Carleton*, 1 Allen, 109; *Denney* v. *Dana*, 2 Cush. 160.

5. The right of stoppage cannot be set up, because the defendants asserted a wholly different and inconsistent title, under a new arrangement, by which the goods were to be held as security generally.

J. D. BALL, for the defendants.

1. The weight of the evidence is that the defendants had no reasonable cause to believe the debtor to be insolvent until he actually stopped payment in September.

2. All but one of the mortgages was a mere change of security, which is valid. *Stevens* v. *Blanchard*, 3 Cush. 169.

3. All the goods now in controversy, excepting one case, were transferred on their arrival simultaneously with the receipt by Bacheller of the bills of lading and invoices from

Turpin, and therefore they were conveyances of property which, but for this arrangement, the defendants would have withheld. It is like the instantaneous seizure which takes place when one mortgages back land to secure the payment of the purchase money, which, if done as part of the same transaction, gives the wife of the vendee no right of dower.

At all events we had a right to stop the goods in the bonded warehouses in September, for the transit was not ended. *Northy* v. *Field*, 2 Esp. 613; *Burnham* v. *Winsor*, 5 Law Reporter, 507; *Donath* v. *Brownhead*, 7 Barr, 301; *Mottraw* v. *Heyer*, 5 Denio, 629; *Harris* v. *Pratt*, 17 New York, 209; *Winks* v. *Hassall*, 9 Bam. & Cress. 372; Kent's Com., 547.

The fact that Bacheller had transferred the goods to Turpin did not affect the right of stoppage *in transitu* as an independent right. *Naylor* v. *Dennie*, 8 Pick. 193; *Skolfield* v. *Bell*, 14 Mass. 40; *Grant* v. *Hill*, 4 Gray, 367; *Feise* v. *Wray*, 3 E. 94.

LOWELL, J.—The thirty-fifth section of the bankrupt act, so far as it relates to preferences, has not, as yet, been construed by the supreme court of the United States, but its meaning is as well established as it can be until it has passed that final ordeal, because the lower courts have been remarkably harmonious in their decisions upon it. A trader is insolvent within the meaning of that section when he is unable to pay his debts as they mature in the ordinary course of his business and not merely when his liabilities exceed his assets. The Massachusetts decisions under the law of that state have approved themselves to the judgment of the courts that have had occasion to pass upon this part of the United States statute, which is borrowed from that of Massachusetts, and is presumed to have been enacted with a full knowledge of its accepted judicial interpretation. It is equally well settled that when a trader is insolvent and knows it and expects or fears that he may at some future time be obliged to stop payment, and at such a time gives security to one cred-

itor, he must be presumed to intend to prefer that creditor, because this is the necessary result of his conduct, if what he expects or fears may happen to come to pass. And it does not relieve the act of this intent to prove that other motives may have co-operated to induce the act such as the pressure of importunity or threats, or proceedings at law on behalf of the creditor so benefited. And if the creditor believed, or had reason to believe, in the insolvency of the debtor and that the security would be likely to make a preference, the case is complete, if bankruptcy in fact occurs within four months. This state of law was assumed in the argument on both sides in this case, and the facts were discussed in view of it. Upon careful consideration I find it impossible to doubt that Bacheller was insolvent in the technical sense on the sixth of May. The correspondence and other evidence which the defendants have furnished with the utmost frankness show that they had reason to doubt his ability to pay with punctuality, and that they did doubt it, though they may have had full hopes of ultimate payment. They were aware that he was constantly in arrears to them and that his excuses were unsatisfactory, and they feared he was over-trading and speculating, which the event shows was probably true. Under these circumstances security is taken at the risk that bankruptcy may intervene within four months.

As Bacheller did not petition until the twenty-second of October, it is plain that the assignment of May sixth cannot be impeached. And the defendants insist that all the transfers of goods in bond and all but one of the mortgages were made in pursuance of that arrangement and date from that time. The plaintiffs contend on the other hand that a mere executory contract to give security is of no avail unless the transaction is completed more than four months before the bankruptcy, and that each deed or assignment dates from the time it was made and not from the time it was agreed to be made. To the cases cited for this doctrine may be added *Arnold* v. *Maynard*, 5 Law Rep. 288; and *Bank of Leaven-*

worth v. *Hunt*, 4 N. B. R. 198. Whatever may be the proper limitations of this rule under the bankrupt act, the rule itself does not apply to the several assignments of goods in bond, because the agreement of May sixth was not so much an undertaking to give security upon property to be thereafter acquired, but as a new contract, by which the deliveries of goods by seller to purchaser were to be conditional, so that Bacheller never acquired the title to these lastings excepting under the terms of the new arrangement, and his creditors had no interest in them unless there should be a surplus after paying the balance due the defendants. If this is the fair construction of that agreement, it can only be impeached by evidence that the goods were already so far vested in Bacheller that there was no consideration for the promise excepting the old debt, and such I understand to be the agreement for the plaintiffs. But the proofs are that the course of dealing even before May sixth, was to send the invoices and bills of lading to Mr. Turpin, and I see no reason to doubt that if this new arrangement had not been made he would have had the right to withhold the lastings not yet delivered, until his account should be paid. It follows that a contract for their conditional delivery gives no just cause of complaint to Bacheller's creditors.

So if security by way of mortgage was given in May, a change in the form or even in the substance of the deeds made within four months of the bankruptcy would be protected, if no greater value were put into the creditor's hands at that time than he had before. This is admitted; but it is urged that the bill of sale of the house, given in May was void and could not form a legal equivalent for the mortgage of July. The facts on this part of the case are not entirely clear, because the original bill of sale cannot now be found. It appears to have been drawn up by the bankrupt's clerk, and his impression, as well as Mr. Turpin's, is that it was not in form a mortgage. Still, it was given and received as a valid security between the parties, and I am not prepared to say that it is shown to be void. The change of securities

was considered to be a mere change of immaterial matters of form, without the least intent to vary the rights of the parties or of creditors, and I am of opinion that I cannot, in the present state of the evidence, undertake to say that the surrender of the bill of sale was not a sufficient consideration even as against creditors for the mortgage on the same property. Since the decision in 4 N. B. R. 198 above cited, I cannot but feel some doubt whether the supreme court would recognize the validity of an unrecorded mortgage of chattels; but my own opinion has been recorded in its favor and that case does not necessarily overrule it. But the mortgage of the house and land on Atlantic street stands differently. It was given for the first time July twenty-seventh, and was not in exchange for anything, and the debtor was then embarrassed and was known by the defendants to be so. I do not recapitulate the evidence. It would seem that Bacheller must have had debts besides those contracted in his regular business, and it may be that the payment of some of those debts is still more objectionable in the view of the bankrupt law than any dealings with Novelli & Co. But with this I have no concern at present. That he was insolvent in the technical sense in July, and that the defendants had reason to believe him so I am constrained to hold upon the evidence exhibited in the records. The result is that the money realized from the mortgage of the land on Atlantic street must be accounted for to the assignees. The proceeds of sales of the goods and of the shop belong to the defendants. Let decrees be entered accordingly.—August 18, 1871.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where a creditor takes an unlawful preference by executions and seizes the bankrupt's property, the assignee is entitled to recover from the creditor such property or its value, and in the accounting the creditor is only to be allowed credit for the actual expenses of sale which does not include the sheriff's fees.

SEDGWICK, assignee v. *MILLWARD.*

BLATCHFORD, J.—There can be no doubt that the defendant took, by his executions, an unlawful preference. The debtors were insolvent and procured and suffered their property to be taken on the executions, with intent to give a preference to the defendant as a creditor, and he had reasonable cause to believe that the debtors were insolvent and that a fraud on the act was intended. The assignee is entitled to recover from the defendant the property or its value. The property has been sold. Under the circumstances in evidence in this case, I must, in the spirit of section twenty-five of the act, regard the sale of the property in New York, by the sheriff of New York, as having been made under the order of this court, and the proceeds of such sale as the measure of the value of such property for the purposes of the controversy in this suit. The defendant is entitled to be allowed credit for the three hundred and five dollars and seventeen cents paid for expenses of sale, and for the one thousand four hundred and forty dollars and forty-one cents paid over to the assignee, but not for the one thousand five hundred and seventeen dollars and twenty cents paid to the sheriff out of the proceeds for his fees on the execution. In regard to the property in Kings county, the plaintiff is entitled to its value less the expenses of selling it. But it does not appear what such expenses were, nor how the net proceeds, sixty-three dollars and eighty-one cents, were arrived at, nor how much it brought on the sale. I am not satisfied with the estimate of value put upon it in the evidence. What it brought at the sale may, if the condition of the property at the time and the circumstances of the sale be shown, be as good evidence

of value as such estimate is. There must be an accounting for such value before a master unless the parties can agree upon it. The defendant cannot be allowed credit for the amount of the fees of the sheriff of Kings county, on the execution to him. The plaintiff is entitled to a decree according to these views, with the costs.

T. M. NORTH for the plaintiff.

F. R. COUDERT for the defendant.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Money cannot be set apart to the bankrupt as part of his exempt property, unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessaries of the bankrupt."

In re W. WELCH.

I, Charles L. Beale, one of the registers of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause and in the cause of the discharge of the duties of the assignee therein, the following questions arose pertinent to the said proceedings, and were stated and agreed to by the said assignee and by the bankrupt.

The bankrupt herein is of the age of seventy years, and resides at said city of Hudson, and is a householder; that his family consist of himself and wife, aged sixty-eight years, and one grand-child of the age of seven years.

That in these proceedings the said bankrupt, being in indigent circumstances, within the proper time, applied to the said assignee to set off to and for him and his use, such property as he was entitled to under the various provisions for exempt property in the bankrupt act. That thereupon the said assignee proceeded to set off such exempt property, and the said property, mainly consisting of dry and fancy goods, the said assignee set off only the following property of the following value and amount, to wit: One suit black

clothes, $5.00: one suit black clothes, $3.00; three shirts at 50 cents, $1.50; one cooking stove, $7.00. Total, $16.50.

That said assignee declined, upon the application of said bankrupt to set off for the use and benefit of said bankrupt, any of said fancy and dry goods. That said assignee sold said dry and fancy goods, and all the property of said bankrupt not so exempt for cash, and realized upon said sale the sum of one thousand three hundred and thirty-three dollars and forty-two cents. That thereupon said bankrupt requested said assignee to set off and allow to him a sum of money, the proceeds of such sale to the amount in all of five hundred dollars.

That said assignee, doubting his right and the propriety so to do, declined for the following reasons: that there were but two precedents therefor, and that in each of said cases the amounts coming into the assignee's hands were large, and that in this case the amounts so coming into the hands of said assignee were small, and that said assignee was apprehensive that if said amount of five hundred dollars was deducted, in his discretion the balance would be insufficient to pay the expenses and disbursements of those proceedings. And said assignee and also said bankrupt, being in doubt as to the propriety and legality of said request and refusal, desire to be certified of the opinion of their honorable court relative thereto, and whether said assignee can legally and should so set off the said sum of five hundred dollars, or any other sum out of said amounts of proceeds of said assets so sold as aforesaid.

CHAS. L. BEALE, *Register.*

BLATCHFORD, J.—Until I know what the dry and fancy goods were by items and description that were sold, and what was "the property of said bankrupt not so exempt" that was sold, it is impossible for me to judge whether such goods and property come within the description in section fourteen of "other articles and necessaries of such bankrupt," so as to make it proper to set them apart, and if sold,

their proceeds. But I do not think that under the word "article" or the word "necessaries," money can be set apart unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessaries of such bankrupt"

June 19, 1871.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

Where the register is called on to certify as to what sum he deems right to be paid to the counsel for the assignee, and signifies three hundred and fifty dollars as the utmost limit, but certifies the question to the court for its opinion because counsel feels aggrieved at the inadequateness of the sum, the ruling of the register was sustained.

In re J. & S. WARSHING.

I, the undersigned register in bankruptcy, having charge of the above entitled matter, do hereby certify that I have been called upon by the assignee of the estate of the bankrupts above named, to tax and adjust the sum which his counsel shall be paid from the funds of said estate in his hands as assignee—or in other words to certify what sum I should think it right to allow him as paid to such counsel upon the final passing of the assignee's accounts.

I have therefore entered upon an examination of the claim of the said counsel and have signified three hundred and fifty dollars as the utmost limit I should feel justified in allowing to him for such aid as he is or may have been entitled to have from counsel in the discharge of his trust. I have stricken out several of the items as not allowable under the second and third subdivisions of the printed instructions heretofore approved by this honorable court, a copy of which is printed upon the back of the assignment to the said assignee. I think it right further to certify, that the services of said counsel seems to me to have been faithful and well directed, and should the court think the amount al-

lowed therefor too small, I shall, if so directed, cheerfully review my conclusion and allow a higher sum.

I scarcely think that the present is a case which I am at liberty to certify to the court, but I do so as counsel seems aggrieved and desire the matter to be reviewed by the court.

I. T. WILLIAMS, *Register.*

BLATCHFORD, J.—I see no reason to believe that the sum allowed by the register is not an adequate sum.

May 24th, 1871.

MISSOURI SUPREME COURT.

[Appeal from St. Louis Circuit Court.]

A commission merchant acts in a fiduciary character and the trust attaches to the goods consigned to him for sale on commission within the meaning of section thirty-three of the United States bankrupt act of 1867.

LENKE v. *BOOTH.*

The question is here presented whether a factor or commission merchant stands in a fiduciary relation to his principals in respect of the proceeds of sales of commission goods, within the meaning of section thirty-three of the bankrupt act of eighteen hundred and sixty-seven. U. S. Stat at Large, 533. The section provides that "no debt created by the fraud or embezzlement of the bankrupt, or his defalcation as a public officer, or while acting in any fiduciary character shall be discharged under the act." The corresponding provision in the bankrupt act of eighteen hundred and forty-one excluded from its benefits "all persons owing debts created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." The "fiduciary capacity" here mentioned was held by the supreme court of the United States to refer to technical trusts of the character of those previously mentioned, and not to trusts raised by implication of law. It was therefore held that an indebted factor or commission merchant was not a fiduciary debtor within the meaning of the act of eighteen hundred and forty-one. *Chapman* v. *Forsyth*, 2 How. 202.

But the above recited provisions of the two acts (of eighteen hundred and forty-one and eighteen hundred and sixty-seven) are quite dissimilar. Blatchford, J. in the matter of Seymour, N. B. R. Sup. vii, on *habeas corpus* distinguishes the two provisions and comments upon *Chapman* v. *Forsyth* as follows:

"The supreme court held that a discharge under the act of eighteen hundred and forty-one did not release the bankrupt from any such debts (as were mentioned in the clause of the act of eighteen hundred and forty-one, above quoted) and that no debt fell within the description of a debt created by a defalcation while acting in any *other* fiduciary capacity, unless it was a debt created by a defalcation while acting in a capacity of the same class and character as the capacity of executor, administrator, guardian and trustee. The court held that the language of the act of eighteen hundred and forty-one was not broad enough to include every fiduciary capacity, but was limited to fiduciary capacities of a specified standard and character. That was clearly so under that act. But in the act of eighteen hundred and sixty-seven the language seems to have been intentionally made so broad as to extend to a debt created by a defalcation of the bankrupt, while acting in *any* fiduciary capacity, and not to be limited to any special fiduciary capacity. Therefore under the act of eighteen hundred and sixty-seven (says the judge) no doubt created by the defalcation of a bankrupt while acting in a fiduciary capacity will be discharged. These views are approved by Nelson, J., in his decision *in re* J. H. Kimball, N. B. R. Sup. xlii.

A commission merchant acts in a fiduciary character, and the trust attaches to the goods consigned to him for sale on commission and to their proceeds when the goods are sold. *Chapman* v. *Forsyth*, supra; *Duguild* v. *Edwards*, 50 Barb. 288.

Concurring in the views of Judge Blatchford as above quoted, the judgment will be affirmed.

The other judges concur.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

A creditor who obtains judgment for his debt after his debtor has been adjudicated a bankrupt, and takes out execution, cannot prove his debt in bankruptcy, and the judgment will not be affected by the certificate of discharge. Such a creditor, therefore, cannot oppose the bankrupt's discharge.

Where a creditor prosecutes his suit merely for the purpose of ascertaining the amount due, he should cause that fact to appear of record and the judgment should be modified to correspond with the fact.

Where such a creditor proved his debt and afterwards obtained an unconditional judgment and took out execution, and appeared to oppose the discharge in bankruptcy, no one having moved to expunge his proof, *Held*, he would be heard against the discharge on filing a stipulation to release his judgment if the discharge should be granted.

In re GALLISON et al.

The debtors' petition was filed December thirty-first, eighteen hundred and sixty-seven, and their application for discharge January twenty-first, eighteen hundred and seventy-one, and was approved by S. Klous & Co., creditors, who had proved their debt, and had afterwards obtained judgment and taken out execution in a suit which was pending at the time of the bankruptcy. There were assets.

E. AVERY for creditors.

J. M. BAKER for bankrupts.

LOWELL, J.—The creditors have not taken the ground that the application should have been made within a year after the adjudication. The decision of NELSON, J., *in re* Greenfield, 2 N. B. R. 100, that the limit applies only to cases in which there are no assets, has been followed by me for the sake of uniformity of practice, until the circuit court here should pass upon the question.

The debtors maintain that S. Klous & Co. are not interested in the question of their discharge, because they have obtained a judgment since the proceedings were begun which will not be affected by the result. It has been one of the vexed questions of the law whether a discharge in bankruptcy or insolvency will operate on a judgment obtained

after the date to which the discharge relates, but before it is actually issued, that is, pending the bankrupt proceedings. In Maine and Massachusetts it has been held that the judgment merges the original debt and cannot be proved in the bankruptcy and will not be affected by the certificate. *Holbrook* v. *Foss*, 27 Me. 441; *Fisher* v. *Foss*, 30 Me. 459; *Pike* v. *McDonald*, 32 Me. 418; *Sampson* v. *Clark*, 2 Cush. 173; *Woodbury* v. *Perkins*, 5 Cush. 86; *Faxon* v. *Baxter*, 11 Cush. 35; *Wolcott* v. *Hodge*, 15 Gray 547.

On the other hand, in New York and Vermont the decision has been that the judgment may be looked into and if it is found that the debt was one that would be discharged, the judgment will be barred. *Harrington* v. *McNaughton*, 20 Vt. 293; *Downer* v. *Rowell*, 26 Vt. 397; *Dresser* v. *Brooks*, 3 Barb. 429; *Fox* v. *Woodruff*, 9 Barb. 498; *Church* v. *Rowling*, 3 N. Y. 216. A similar difference of opinion has already appeared in connection with the act of eighteen hundred and sixty-seven. *In re* Williams, 2 N. B. R. 79; *Bradford* v. *Rice*, 102 Mass. 472; *in re* Brown, 3 N. B. R. 145; *in re* Crawford, 3 N. B. R. 171.

The argument for the side which the defendant assumes in this case appears to me much the stronger. Not only the technical doctrine of merger is involved, but the defendant has had his day in court and one opportunity to plead this defence; and I take it to be a rule of the highest importance that a defence which might have been made to the original cause of action can never be made to the judgment. Now the bankrupt act provides most carefully for a stay of suit until the defendant's discharge is passed upon; giving, by fair implication, a power to the district court even to enjoin actions in the state courts, contrary to the general practice. All this is for the very purpose of enabling the bankrupt to plead his discharge. If he does not choose to avail himself of this right, what possible ground is there for saying that the judgment shall not bind him? Are we to inquire in each case why his plea was not set up or why it was overruled? It may be that the state court was of opinion that the dis-

charge if granted would be no bar. We cannot impeach their decision collaterally. It may be that the bankrupt intended not to set up the discharge against this creditor. We cannot authorize him to reconsider this determination; it may be that he was surprised. If there were any failure of justice in the particular case, the remedy must of course be found with the tribunals of the same jurisdiction. Until they have reversed or set aside the judgment, it operates as a new contract, and cannot be barred by a discharge which distinctly relates, as does this, to a date two years earlier.

Coming to the decisions, we find that the two leading cases in New York both contain dissenting opinions of great ability by ALLEN, J., in 3 Barb. 492, and BRONSON, J., in 3 N. Y. 216, besides decisions and *dicta* of inferior courts of that state, against the doctrine finally established there.

I consider these dissenting opinions well worthy of examination, and refer to them as able statements of what I consider the true doctrine; and they cannot but weaken the force of these authorities. But the conflict is really explained by the difference of practice in the several states. In Massachusetts, the bankrupt could always obtain a continuance to enable him to plead his discharge; while in New York he could not. This difference is pointed out in *Haggerty* v. *Amory*, 7 Allen, 458, and is confirmed by the remarks of the learned judge who delivered the opinion of the court in 3 N. Y. 224, where, in commenting on a remark of the chancellor at 11 Paige 535, that the defendant ought to have pleaded his discharge at law, he says: "and this may be conceded where the defendant has an opportunity for that purpose, which was not the case of the defendants in this suit." In consideration of this concession, it may well be doubted whether the decision would have been the same under a law which gives the most ample "opportunity for that purpose."

In truth this is the source of the whole difficulty. It is seen to be unjust that a creditor should push his debt to judgment against a bankrupt who is using due diligence to

obtain his discharge, and has surrendered all his property. It was accordingly enacted in England as early as seventeen hundred and thirty, that if a creditor did obtain such a judgment and take the debtor on execution, he should be discharged on motion. Stat. 5, Geo. 2, ch. 30, s. 13. And this has been continued in force whenever the law has been revised. This is the foundation of all the English decisions, and they have given rise to an impression that in bankruptcy, a judgment obtained at such a time will be discharged, and these decisions have had an undue weight in some of the decisions in this country. See the arguments in *Dresser* v. *Brooks*, 3 Barb. 429. The law is so in England, but it is the statute itself which provides for the case, and not any general rule in bankruptcy. It is easy to see by studying the English cases that this practice was established by statute to meet the very difficulty which our statute meets by granting a stay of suits until the question of discharge is determined. Which of the two modes of meeting the difficulty is the better it is for the legislature to determine, but that they are essentially different is plain.

By section twenty-one, an action may, by leave of the court in bankruptcy, proceed to judgment for the purpose of ascertaining the amount due, and that judgment may then be proved, but execution shall be stayed. This exception strengthens the argument for the general rule, because it implies that an ordinary judgment, procured after the proceedings in bankruptcy are begun, cannot be proved in the bankruptcy. It is clearly the intent of the proviso, that it should appear of record that the suit is prosecuted only for the particular purpose of establishing the amount of the debt, and that the court in which the suit is pending should modify its judgment as may be necessary to meet this state of facts, and should take care that no execution issue; and if the discharge should afterwards be granted, that court ought undoubtedly to vacate or discharge the judgment in some proper way, and I hold it to be the duty of the creditor to see that the record is rightly made up. This provision is

useless if an ordinary judgment, not obtained by virtue of this proviso, can be proved in the bankruptcy, is to be binding on the parties, in the absence, of course, of any such fraud, error or accident as would require the court itself or some appellate court to vacate it. The objecting creditor here did not apply for leave to prosecute; did not record the fact that he intended to prove his judgment; did not stay his execution, but took it out and now holds and intends to enforce it. It was argued in his behalf that the superior court may yet set it aside. But he cannot be heard to set up this possibility when he himself is still relying on the judgment, which was obtained by his own act, and the validity of which he intends to maintain if he can.

For the reasons given and upon a careful examination of the decisions, I am of opinion that a judgment obtained after the adjudication in bankruptcy, creates a new debt which cannot be proved in bankruptcy, because the judgment is a merger and creates a new debt, and that the judgment creditor cannot oppose the discharge because he has no provable debt, and because the discharge will be no bar to the judgment.

These creditors proved their debt before they obtained the judgment, and have a standing in court which no one has undertaken to destroy by a motion to expunge. I hold it therefore within my power to say that they may keep their proof if they will file a stipulation to release their judgment in case the final decision in bankruptcy should grant the bankrupt his discharge. This will meet the exact justice as well as the law of this case. If they shall do this within a week, I will hear the case further. If not, the objections will be dismissed.—October, 1871.

UNITED STATES CIRCUIT COURT—E. D. PENNSYLVANIA.

[Before McKennan, C. J. and Cadwalader, D. J.]

Where only one subject of an intended execution can have been in view of the parties to a confessed judgment, a levy made accordingly on that subject and a sale of it by the sheriff, though constituting in form an involuntary transfer is, indirectly, transfer or disposition of the property by the debtor.

An intended security which would be ineffectual in the form of a mortgage or bill of sale, cannot be rendered effective through the device of a warrant of attorney given by a trader to a creditor, which enables him at pleasure to stop the debtor's business and prevent other creditors from getting any share of his available assets.

A confession of judgment, if otherwise invalid under the thirty-fifth section of the bankrupt act, cannot be valid for any such reason as, that the power of attorney bore date more than four or six months before any actual mortgage or transfer.

Where an execution must necessarily stop the debtor's business, the execution creditor, as a rule, has reason to believe the debtor insolvent, and in general intends what, if not prevented, would be a fraud on the provisions of the bankrupt law.

HOOD et al. v. *KARPER et al.*

Bill at the suit of the petitioning creditors of an involuntary bankrupt *merchant* or *trader*, on behalf of themselves and the other creditors, to the intent that the assignee, when qualified, might be added or substituted as complainant.

The purpose of the bill was to prevent a creditor from proceeding with an execution levied upon the stock in trade of the bankrupt. The execution was upon a judgment confessed by the bankrupt under a warrant of attorney. The warrant was dated *more than six months*, but the judgment was confessed *within four* months before the filing of the petition in bankruptcy.

The judgment had not been an available security, as a lien upon real estate, or available in anywise except through such an execution as might be thus levied on the debtor's stock in trade; and was for such an amount of money as could not have been levied without *closing his business and absorbing his available assets.* The consideration of the judgment was not impugned. The warrant of attorney had been a renewal of, or substitute for, one originally given before the enactment of the present bankrupt law.

A preliminary injunction having been granted, the subjects of the levy were sold under an order of this court, made by consent. The sale was under the direction of a commissioner specially appointed by the court; and the proceeds were brought into the registry of the court; all this having been done with a saving of any rights of the execution creditor, whose lien, if established, was to stand good upon the fund in court, and to avail him against the assignee in bankruptcy, &c.

The thirty-fifth section of the bankrupt law of second March, eighteen hundred and sixty-seven, enacts, that if any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, *with a view to give a preference* to any creditor or person having a claim against him, or who is under any liability for him, * * * * makes any * * * *transfer* * * * of any part of his property, either directly or *indirectly* * * the person receiving such * * * transfer, * * * * or to be benefited thereby, * * * * having reasonable cause to believe such person is insolvent, and that such * * * assignment * * * is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; AND if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any * * * *transfer* * * * or *other disposition* of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such * * * transfer or other conveyance is made with a view to * * * * * * defeat the object * * * * * * of this act, the * * * transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such * * * assignment, transfer or conveyance is not made in the usual and *ordinary course of business* of the debtor, the fact shall be *prima facie* evidence of fraud.

The thirty-ninth section, after defining the cases in which a person may be involuntarily adjudged a bankrupt, upon a petition against him brought within six months after the act of bankruptcy, concludes with a provision which, as amended by congress on twenty-seventh July, eighteen hundred and sixty-eight, is that, if such person be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred, contrary to the original act. *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on the act was intended, *and* that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy.

At the October sessions of eighteen hundred and seventy-one, the case was heard upon bill, answer, replication and proofs; and was argued by Mr. Patton, for the complainants, and Mr. Sharp for the execution creditor, defendant.

The questions argued were—

1. Whether, if the sale by the sheriff had not been prevented by the injunction, the confession of judgment, execution, levy and sale, would, within the meaning of the thirty-fifth section, have constituted an *indirect transfer* of the property, with a view to give a *preference.*

2. Whether the same acts would, under the same section, have constituted a transfer or *other disposition*, with a view to *defeat the object of the bankrupt law.*

3. Whether, if either of the former questions were answered affirmatively, the transfer or disposition was made at the date of the warrant, or at or after the time of confessing the judgment.

4. Whether, from the warrant of attorney, confession of judgment, execution and levy, the execution creditor had reasonable cause to believe that the debtor was insolvent, and that the proceedings were in fraud of the provisions of the bankrupt act.

CADWALADER, J.—FIRST. By the express language of the

thirty-fifth section of the act of congress, the objectional transfers described in that section are voidable alike whether made "directly or indirectly." Where only one subject of an intended execution can have been in view of the parties to a *confessed* judgment, a levy made accordingly on that subject, and a sale of it by the sheriff, though constituting *in form* an *involuntary* transfer, is *indirectly* a transfer or disposition of the property by the debtor. This needs no demonstration. If the proposition required the support of authority, it might be found in judicial opinions, at law and in equity, upon cases of leases on a condition that the term shall cease if assigned. In such cases, an *involuntary* transfer of the term under an execution, though it may have been levied under a judgment confessed by the lessee upon a warrant of attorney, is not a breach of the condition. But where the judgment appears to have been thus confessed with an intent of both parties that the term should be taken in execution, and thus transferred, the transfer is not considered involuntary, and the condition is broken. The defendant who could not make an effectual transfer directly, cannot make it indirectly.

SECOND. In England, independently of any question of *preference*, a transfer of the *whole available property* of a bankrupt trader may be voidable at the suit of his assignee from the necessary tendency of such a transfer to defeat the object of the bankrupt law. In the United States, under the words of the act of second March, eighteen hundred and sixty-seven, there is less difficulty in so annulling such a transfer.

The most beneficial purposes of the bankrupt law would be frustrated, if an intended security which would be ineffectual in the form of a mortgage or bill of sale, could be made effectual through the device of a warrant of attorney given by a trader to a creditor, enabling him at pleasure to stop the debtor's business and prevent the other creditors from getting any share of his available assets. It has been urged that a capitalist should be able, by advancing his

money, or lending his credit, to promote commercial enterprise without insecurity as to reimbursement. The protection to which capitalists are thus entitled, should not, however, be so extended as to encourage them in the promotion of fraudulent overtrading by debtors to the sacrifice of other meritorious interests.

THIRD. The next question is, at what time the objectionable disposition or transfer was made or attempted; whether at the date of the warrant of attorney, or at or after the time of confessing the judgment. Here we may consider the confession of judgment, the execution, the levy and the sale, or attempted sale, as together constituting a single act to effectuate the transfer. It is argued that the transfer, though it was to be thus effected, was made *through* or by means of the warrant which was anterior. This undoubtedly is true. But it is not a consequence of these premises that the transfer was made at the date of the warrant.

We concur in opinion with the judge of the northern district of Illinois, that the preference by means of a judgment note is obtained, not with the note when a warrant of attorney to confess judgment is executed *and delivered*, but when it is *executed by the entry of the judgment*. The power, as he says, until thus executed, is dormant, and, in most cases, secret. 5 N. B. R. 62.

The act of confessing the judgment is the debtor's act. It is true that this act is done by virtue of his warrant of attorney. But the attorney's act in confessing the judgment is that of his principal, the debtor. The warrant is of no effect until the power conferred by it is thus executed. If the debtor dies in the meantime, it is, from first to last, wholly inoperative. The case, in principle, is, in this respect, the same as if the debtor had given a power of attorney to execute a mortgage or other security, for a particular creditor's benefit. Such a power, even when irrevocable, does not, while unexecuted, constitute a mortgage or transfer of any kind. When the power is executed, the mortgage or transfer which thereby occurs, if otherwise invalid under

the thirty-fifth section of the bankrupt act, cannot be valid for any such reason as that the power of attorney bore date more than four months, or more than six months, before any actual mortgage or transfer.

It is contended that, in this case, the warrant of attorney having been a renewal of or substitute for a like warrant held by this creditor before the enactment of the present bankrupt law, must, in equity, be considered as having been given before its enactment. We think so. But this cannot be material, unless we are mistaken in the above opinion that the indirect transfer or disposition cannot be referred to the date of the warrant of attorney. If the non-existence of a bankrupt law, at the date of such a warrant, might have suggested peculiar considerations under the bankrupt act of eighteen hundred and forty-one, it may be observed that the phraseology of the act of eighteen hundred and sixty-seven is studiously different.

FOURTH. Where an execution must necessarily stop the debtor's business, the execution creditor, in general, has reason to believe the debtor insolvent; and, in general, intends what, if not prevented, would be a fraud on the provisions of the bankrupt law. There is nothing in this case to take it out of the rule.

For these reasons we are of opinion that if the assignee in bankruptcy was the complainant, and the case had been ripe for a final decree, the bill would be sustainable.

The reasons under the first, second and fourth heads will be understood as limited in their present application to the bankruptcy of a merchant or trader. Moreover, they do not apply to a judgment confessed, even by a merchant or trader, which, being otherwise unobjectionable in bankruptcy, is an available security as a lien upon real estate. Judgments of this kind, under warrants of attorney, may be innocent and useful securities. Nor, where a merchant or trader has no available real estate, are judgments confessed by him under warrants of attorney always necessarily objectionable. They may be for amounts comparatively small, so that executions

on them would not stop his business. Their validity, as against an assignee in bankruptcy, may then depend, in some cases, on the question whether the creditor would have received a preference if he had taken a mortgage or bill of sale instead of the warrant of attorney. But the bill of sale, or mortgage, if not secret or unaccompanied by possession, may be the less questionable security. A warrant of attorney by a merchant or trader, though not always invalid, even where given within four months of his bankruptcy, must always be regarded with more or less disfavor in a commercial tribunal, such as a court of bankruptcy.

There cannot be a final decree until the assignee in bankruptcy shall have become a party complainant. In consequence of the delay in this respect the bill would have been dismissed, if its dismissal had been asked on the part of the defendant, unless collusion with him by an assignee could be shown, or the delay could be otherwise explained or excused. As yet no assignee has been qualified. This may seem extraordinary. But the defendant's counsel admits that the delay is excusable, though its causes have not been fully explained.

Although the execution creditor's proceeding was "in fraud of the provisions of the bankrupt act," the case was one of relative or *constructive*, not of *actual* fraud. The entry of a final decree against him would therefore at all events have been suspended for a brief period, after the above declaration of our opinion. He should, in equity, have a reasonable opportunity of considering whether to surrender his claim under the execution, prove his debt in the court of bankruptcy, and pay all the costs in this court and the charges incurred, or consent that they be deducted from his dividend of the money in court. But his decision must precede a final decree. After it, proof by him could not be allowed.

The district judge added:

The above opinion was concurred in by judge McKennan

on the nineteenth instant, before he left Philadelphia. The concluding provision of the thirty-ninth section of the bankrupt act of second March, eighteen hundred and sixty-seven, as amended by the act of twenty-seventh of July, eighteen hundred and sixty-eight, though not expressly quoted, was fully considered, as the opinion shows. That provision is in effect supplementary to the thirty-fifth section. The other enactments of the thirty-ninth section were not mentioned, because they only define the acts of a debtor for which he may be involuntarily adjudged a bankrupt. The decision of the case depended on the thirty-fifth section, which defines acts that may render other persons liable to actions at the suit of the assignee for the recovery of assets. But references to the thirty-ninth section occasionally facilitate the interpretation of the thirty-fifth; and it has occurred to me that the third of the questions which have been considered may be further elucidated by a comparison of the two sections upon one point. This question was, whether, under the thirty-fifth section, the objectionable disposition of property is at the date of the warrant, or at that of the confession of judgment. The thirty-ninth section makes the mere giving, under certain circumstances, of a warrant to confess judgment within six months before an adversary petition, an act of involuntary bankruptcy. This applies to the debtor only. The thirty-fifth section, of which the enactments affect other persons, does not mention such a warrant at all. Thus the creditor who has the warrant of attorney is never affected injuriously by merely having received it. The reason of the difference may be obvious, but is not therefore less applicable. The subsequent use of the warrant of attorney can alone give rise to any question so far as he may be concerned. To exempt him, by reason of its date, from all consequences for such a subsequent use of it, would therefore seem incongruous. This may furnish a reason additional to those already given, that the date of the warrant is not the time of the objectionable disposition.

If the decision of the present case had, under the thirty-

fifth section, depended upon the question whether the debtor, within four months before the petition, *procured* the property *to be seized on the execution*, we would have been of opinion, that mere passive submission by him, without any direct promotion of the creditor's action, or any insidious artful omission tending indirectly to promote it, within the four months, was not such procurement. We do not decide the case on this point.

J. W. PATTON, ESQ., for complainants.

W. S. STENGER, F. M. KIMMEL and J. MCDOWELL SHARPE, ESQS., for defendants.—October 25, 1871.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

An additional assignee may be appointed to act in conjunction with the one previously appointed, upon a petition to the court showing sufficient reasons for so doing.

An application to contest a claim against bankrupt's estate will be allowed upon a petition and affidavits stating fully and in detail the grounds upon which such application is based.

In re E. OVERTON.

HALL, J.—On reading and filing the petition of Elizabeth P. B. Overton, and the affidavits thereto annexed, it is hereby ordered and adjudged, that it is expedient that an additional assignee of said bankrupt should be appointed herein, and that Hon. Charles Mason, of the city of Utica, be and he hereby is appointed an additional assignee to act herein in conjunction with Parker N. Teft, heretofore appointed assignee in this matter, on his giving security in the sum of five thousand dollars for the faithful performance of his trust, the same to be approved by William H. Comstock, register in bankruptcy.

And it is further ordered, that the petitioner be allowed to renew the application to contest the claim of the Howe Machine Company, and for an order for the disallowance and rejection thereof upon a petition and papers stating fully and in detail the grounds upon which such application may be based.

I. E. L. HAMILTON and WADSWORTH & WHITE for petitioning creditor.—May 15th, 1871.

UNITED STATES CIRCUIT COURT—LOUISIANA.

A petition to review and reverse an adjudication of bankruptcy was filed in the U. S. circuit court by commissioners appointed under state law, for the purpose of liquidating the affairs of a bank. The defendants to the petition of review, except on the ground that the commissioners are not the legal representatives of the bank. The court decided that the petition of review must be dismissed at the costs of the commissioners, and that the judgment whereby the bank was adjudged bankrupt, be affirmed, and that the injunction heretofore granted be rescinded and revoked.

THORNHILL et al. v. *BANK OF LOUISIANA.*

WILLIAMS et al. v. *BANK OF LOUISIANA.* *

WOODS, J.—These causes were petitions filed to obtain an adjudication of bankruptcy against the defendant, under the section of the general bankrupt act providing for involuntary bankruptcy.

After argument and re-argument, the United States district court for the district of Louisiana, (Hon. E. H. Durell, judge,) on the eleventh January last, rendered judgment, declaring and adjudging the Bank of Louisiana a bankrupt.

To review and reverse this adjudication a petition of review was filed on January twenty-second, in the United States circuit court for the fifth judicial circuit and district of Louisiana, by C. E. Willoz, P. H. Morgan and J. F. Irwin, as commissioners of the Bank of Louisiana, appointed under a state law by the sixth district court of the parish of Orleans, for the purpose of liquidating the affairs of the bank.

The defendants to the petition of review except to the petition on the ground that the petitioners (the commissioners aforesaid) are not the legal representatives of the bank; that the act of the general assembly of Louisiana, under the color of which the petitioners claim to represent the bank, and which was approved March fourteenth, eighteen hundred and forty-two, was a bankrupt and insolvent law, and was suspended by the act of congress approved March

* See 3 N. B. R. 110.

second, eighteen hundred and sixty-seven, to establish a uniform system of bankruptcy throughout the United States; that therefore the petitioners are without right or authority to interfere in these proceedings; that they have not been aggrieved by the adjudication aforesaid, and their petition of review should be dismissed.

It appears from the agreed statement of facts that on the eleventh of February, eighteen hundred and sixty-eight, the board of directors of the bank passed a resolution anthorizing the president of the bank to instruct its counsel to institute proceedings under the second section of the act of the general assembly of Louisiana approved March fourteenth, eighteen hundred and forty-two, for a meeting of the stockholders of the bank to deliberate and determine upon the expediency of surrendering its charter, with a view to a liquidation of the bank for the common benefit and advantage of the creditors and stockholders of the bank, and in conformity with the provisions of law; that, by authority of this resolution, the counsel of the bank, on the twenty-fourth February, eighteen hundred and sixty-eight, filed in the district of New Orleans the petition of the president, directors and company, alleging that the bank was in a position which rendered it impossible for it at that time to discharge its liabilities to its creditors and stockholders, reciting the resolution above mentioned, and praying the court for an order for a meeting of the stockholders, for the purpose of deliberating on the expediency of surrendering the charter of the bank; that it having been found impossible to obtain the necessary attendance of stockholders to make a voluntary surrender of the charter, the attorney general of the state of Louisiana, on May first, eighteen hundred and sixty-eight, filed a petition in the same court for the forfeiture of the charter of the bank; that the bank filed no answer to said petition, but the board of directors, having been informed by the president that he had been served with an injunction and a citation and copy of petition from the sixth district court, in a suit instituted by the attorney general for the for-

feiture of the charter of the bank, the board of directors thereupon resolved, "That the cashier be authorized to inform the attorney general that no answer would be made in said cause, and that the court will decide the question raised upon the facts put in proof on the part of the state;" and on the twentieth of May, eighteen hundred and sixty-eight, the sixth district court ordered and decreed the charter of the bank be declared forfeited, null and void; that all judicial proceedings against the bank be stayed; that a board of three commissioners, of whom Charles Eugene Willoz should be one, should be organized for the purpose of the liquidation of its affairs; that, under this judgment, commissioners were appointed, who immediately assumed the administration of the affairs of the bank, under the laws of the state of Louisiana until their proceedings were arrested by the filing of the petition of John Thornhill and others, in the United States district court of Louisiana, May twentieth, eighteen hundred and sixty-nine.

The act of the general assembly of Louisiana under which these proceedings were had is entitled, "An act to provide for the liquidation of banks." The first section of the act provides in certain specified cases for the forced forfeiture by judicial proceedings of the charters of any of the banks located in the city of New Orleans, at the instance of the attorney general, on petition filed by him in the name of the state. The second, third, fourth, fifth and sixth sections provides for a voluntary surrender of charter and dissolution of the corporations by certain proceedings of the stockholders, and the decree of the court.

In case either of a forced forfeiture or a voluntary surrender of the charter of a bank, the act requires the court to appoint commissioners, who are empowered to take possession of all the property and effects of the bank of every description, with all its books, papers and accounts, to make an inventory of the property and effects, to supervise the destruction of all the notes of the bank found on hand, to collect the assets and pay the debts of the bank as prescribed

by the law, and having done this, to distribute any balance that may remain on hand among the stockholders rateably, according to the number of shares held by each.

The petitioners in review claim that, under the provisions of this act, the charter of the Bank of Louisiana was declared forfeited, null and void by a court of general and competent jurisdiction; that, as a consequence of this decree, the bank, when proceedings in bankruptcy were commenced against it, was no longer in existence as a corporate body; that it was dead, and no proceedings could therefore be taken against it.

The conflicting views of the petitioners in review and the defendants in review bring up the question whether the act of March fourteen, eighteen hundred and forty-two, remained in force after the taking effect of the general bankrupt law of June first, eighteen hundred and sixty-seven. If the state law was suspended or repealed by the bankrupt law, the sixth district court had no jurisdiction to proceed under that law, and, notwithstanding it may be a court of general jurisdiction, its decree is void. Where there is no jurisdiction of the subject matter, the action of the court is a nullity and may be collaterally impeached. In *Thompson* v. *Talmie*, 2 Peters, 163, it was held that "if there is a total want of jurisdiction, the proceedings are void and a mere nullity, and confer no right and afford no justification, and may be rejected when collaterally drawn in question."

In *Voorhees* v. *Bank of the United States*, 10 Peters, 474, the court held that "a judgment or execution irreversible by a supreme court cannot be declared a nullity by any authority of law if it has been rendered by a court of competent jurisdiction of the parties to the subject matter, with authority to use the process it has issued. The errors of the court do not impair their validity; binding until reversed, our most solemn proceedings can confer no right which is derived, to any judicial act, under color of law, which can properly be decreed to have been done *coram non judice*; that

is, by persons assuming the judicial function in the given case without authority of law."

In determining whether the act of eighteen hundred and forty-two continued in force after the taking effect of the general bankrupt law, and as a consequence whether the sixth district court had jurisdiction to proceed under that law, it is pertinent to inquire into the nature, purpose, and effect of the act.

From an inspection of the law, it is evident that it is intended as a bankrupt or insolvent act. It provides for the voluntary and involuntary bankruptcy of insolvent banks. By virtue of the provisions of the law, the entire property of the corporation is taken from its control and placed in the hands of the commissioners appointed by a power other than the bank. They, and they alone, are authorized and required to collect its assets, pay its debts, and distribute the surplus, if any, among the stockholders, and, by a decree of forfeiture or dissolution, the corporation is discharged from liability after the final settlement of its affairs; for, being dead, it cannot be sued or stand in judgment. Section twenty-four of the act provides that, in all matters not specially provided for in the act, the powers, duties and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates, &c.

Here we have all the elements of a bankrupt law—insolvency, surrender of property, its administration by assignees or commissioners, distribution among creditors of the assets, and, in effect, the discharge of the insolvent corporation.

The act of eighteen hundred and forty-two has been repeatedly held by the supreme court of Louisiana to be a bankrupt or insolvent law. In *Citizens' Bank of Louisiana* v. *Levee Steam Cotton Press Company*, 7 Annual Reports, 288, EUSTIS, C. J., referring to the act of eighteen hundred and forty-two says: "We do not perceive in this legislation anything more than an exercise of power which the government of the state has over bankrupt estates. This power is inher-

ent in all well regulated governments under which commerce is regulated."

In *Mudge et al.* v. *Commissioners of the Exchange and Banking Company*, 10 Robinson, 464, the court says: "We concur in the opinion expressed by our learned brother of the commercial court, that the power of the legislature to provide for the distribution of the property of insolvent corporations which have forfeited their charter among the creditors is undoubted, and in considering these acts for the liquidation of banks as are other than insolvent laws applicable to such corporations."

See also *Dorville* v. *City Bank*, 9 Robinson, 366, and *French* v. *Stanton et al.* 1 Annual Reports, 8.

We are, therefore, forced by the terms of the law itself and by the construction put upon it by the supreme court of Louisiana, to the conclusion that the act of eighteen hundred and forty-two is a bankrupt or insolvent law. An examination of the act further shows that its provisions apply, as well as those of the general bankrupt act, to monied corporations, and that it prescribes a different rule for the distribution of the assets of the insolvent corporation from that established by the bankrupt law.

Can these two laws, applicable to the same subject matter, and prescribing different modes of proceedings and different results, co-exist; and if not, which must give way?

The constitution of the United States, having empowered the congress to establish uniform laws on the subject of bankruptcies throughout the United States, and the congress having exercised this power in the enactment of the bankrupt act, and the constitution further providing that the laws of the United States which shall be made in pursuance of the constitution shall be the supreme law of the land, the inference is irresistible that state laws on the subject of bankruptcy and insolvency must yield to the law of congress on the same subject where the state laws applies to the same subject matter; and where it differs, in material respects,

from the law of congress, it appears clear that the state law is suspended while the law of congress remain in force.

So in *Griswold* v. *Pratt*, 9 Met. 23, the court held: "Considering our insolvent law to be a system introduced for the purpose of sequestering the effects of the insolvent debtor, and of discharging him of all debts contracted after the enactment of the law, we are satisfied that the two systems cannot stand together; that the provision of the constitution authorizing congress to establish a uniform bankrupt law does not of itself prevent the enactment of insolvent laws by individual states, yet, when the power is exercised by congress, and a bankrupt law is in force, it does not suspend all state insolvent laws applicable to like cases, and that this effect follows the enactment of such bankrupt law, and does not require the actual institution of proceedings in bankruptcy to produce such result."

In *May et al.* v. *Buel et al.* 7 Cushing, 40, the court uses this language: "When a uniform system of bankruptcy, under a law of the United States, is actually in force, to the [the] extent to which it reaches, it must of necessity suspend state laws, because they would be repugnant."

In *Clark, assignee* v. *Rosenda et al.* 5 Robinson Louisiana Reports, 33, GARLAND, J., in speaking of the effect of the general bankrupt law of eighteen hundred and forty-one, says: "I cannot imagine a more ample investment of jurisdiction than congress has conferred on the circuit and district court of the United States, and the extent of the jurisdiction proves that the national legislature, whilst exercising its constitutional power to establish a uniform system of bankruptcy, intended to suspend, if not sweep out of existence, the insolvent laws of the states and the jurisdiction of their tribunals, and to establish other tribunals, with ample powers, where justice should be administered alike to all, and a general system formed and controlled by a body of judges deriving their authority from the same power that made the law."

MARSHALL, C. J., in *Sturges* v. *Crowninshield*, 4 Wheat. 195,

says: "It does not appear to be a violent construction of the constitution of the United States, and is certainly a convenient one, to consider the power of the state as existing over such cases as the law of the Union may not reach. * * It is not the right to establish these uniform laws, but their actual establishments, which is inconsistent with the partial acts of the state."

The Bank of Louisiana is, according to the agreed statement of facts, an insolvent monied corporation. Such a corporate body falls within the purview of the general bankrupt law of the United States; and, according to the authorities cited, a state law applicable to a like case is in effect suspended by the act of congress.

I am of opinion, therefore, that, on the taking effect of the general bankrupt law of the United States, on June first, eighteen hundred and sixty-seven, the law of the state of Louisiana approved March fourteenth, eighteen hundred and forty-two, providing for the liquidation of banks, was suspended; that the state courts had no jurisdiction to proceed under it; that all the proceedings of the sixth district court, under the state act against the Bank of Louisiana, were unauthorized, *coram non judice*, null and void.

Against this view it is urged that a state alone has power to forfeit the charter of a corporation created by itself; that the general bankrupt law does not provide for the forfeiture of the charters or the dissolution of insolvent corporations; that, therefore, that part of the state law of eighteen hundred and forty-two which make provision for such forfeitures is not suspended by the bankrupt law, but left in full force, and the state court, under that provision of the law, having forfeited the charter of the bank, there is no corporate person *in esse* for the bankrupt law to operate on.

This argument may be fairly reduced to this proposition—that, although the national courts have exclusive jurisdiction in bankruptcy of insolvent monied corporations, yet, under the device and pretext of forfeiting the charters of the banks, the state courts may oust the jurisdiction of the federal

courts, assume jurisdiction themselves, and give to a state law the effect of repealing and suspending an act of congress expressly authorized by the constitution. This cannot be allowed. No mode of proceeding authorized by a state law can be permitted to have this effect. If the forfeiture, under the state law, of the charter of the bank raises an obstacle to the jurisdiction of the federal courts, then the claim authorizing the forfeiture of the charter is suspended by the federal law. To hold otherwise is to allow the states, by a particular form of liquidation, to override a law of congress on a subject on which congress, by the constitution, has supreme power.

Under the state law of eighteen hundred and forty-two the courts are not authorized to forfeit the charters of the banks, and there stop. They are required to proceed by the appointment of commissioners to the liquidation of the affairs of the bank; in effect, to administer a bankrupt law of the state. Is it possible that, by so short and simple a method, the state courts can wrest from the federal courts a jurisdiction conferred exclusively on them?

I do not undertake to decide what effect the decree of the sixth court forfeiting the charter of the bank may have as between the state and the bank; but I hold the state court had no power and jurisdiction to render a decree which could take from the federal courts a power and jurisdiction given them by act of congress; that, for all the purposes of the bankrupt act, and the liquidation of its affairs thereunder, the Bank of Louisiana still exists as a corporate body, and may be proceeded against as such in bankruptcy.

A corporation may still exist for the purposes of liquidation, although its charter may have been surrendered or forfeited. In *Commercial Bank* v. *W. W. Villavaso*, 6 Annual La. Rep. 542, it was held that a commercial bank, having gone into liquidation under the act of March, eighteen hundred and forty-two, was no reason why the commissioners appointed to liquidate its affairs should not use the corporate

name of the bank in collecting its assets by judicial proceedings.

It results from these views that the sixth district court had no power to appoint commissioners in liquidation for the Bank of Louisiana; that the attempt to appoint such commissioners is a void act; that the commissioners named by the court do not represent the bank; that they are without right or authority to interfere in these proceedings; that they are not aggrieved by the adjudication of the district court of the United States for the district of Louisiana; and that for these reasons, if no other, their petition for review should be dismissed.

Without further prolonging this opinion, I hold upon the other questions raised in the case: (1) that this court has territorial jurisdiction to hear this petition in review, in chambers, at any place within the fifth judicial circuit; (2) that the adjudication in bankruptcy made by the United States district court may be reviewed by petition of review addressed to the circuit court or any justice thereof; and (3,) that the judgment of the United States district court adjudging the Bank of Louisiana a bankrupt is sustained by the admitted facts in this case, and ought not to be disturbed.

DECREE.

It is therefore ordered, adjudged, and decreed that the petition of review filed in this court on the twenty-second day of January, eighteen hundred and seventy, by Charles E. Willoz, Philip H. Morgan, and Henry Bezon, as commissioners of the Bank of Louisiana, in the cases of *John Thornhill et al.* v. *Bank of Louisiana*, and *Mrs. S. Williams* v. *Bank of Louisiana*, be, and the same is hereby, dismissed out of this court, at their costs; that the judgment of the United States district court for the district of Louisiana, rendered on the eleventh day of January, eighteen hundred and seventy, whereby, on the hearing of the cases aforesaid, the Bank of Louisiana was adjudged a bankrupt, be affirmed and that the order heretofore made that all further proceed-

ings in said district court be suspended, and the marshal enjoined from taking any action under the judgment rendered by the said United States district court in said suits until the further order of this court, be, and the same is hereby, rescinded and revoked; and that the clerk of the circuit court of the United States for the fifth judicial circuit and district of Louisiana enter this order and decree upon the minutes of said court and certify the same to the clerk of the United States district court for the district of Louisiana.

UNITED STATES CIRCUIT COURT—LOUISIANA.

[APRIL TERM, 1870.]

Where a party appeals from the decision of the United States circuit court to the United States supreme court, the allowance of the appeal is to relate back to the time when the original application was made for an appeal to the judge of the circuit court, and entitles a party to a stay of proceedings.

Decreed that all orders in the above entitled cause made by the circuit or district courts since the date of the injunction granted by the circuit judge, be vacated and annulled, and it is ordered that all things be restored to the condition in which they stood at the date of said injunction.

THORNHILL et al. v. *BANK OF LOUISIANA.*
WILLIAMS v. *BANK OF LOUISIANA.**

BRADLEY, J.—In this case, we have taken the matter into consideration, and have come to the conclusion that the appellant was entitled to a supersedeas. By the act of seventeen hundred and eighty-nine, section twenty-three, a writ of error, (which was the only process then given for resort to an appellate court) as well in equity as in common law cases was a supersedeas and a stay of execution in cases only where the writ of error was served by a copy thereof being lodged for the adverse party in the clerk's office, where the record remained, within ten days, (Sundays exclusive) after rendering the judgment or passing the decree complained of. A writ of error is no longer the process for reviewing

* 3 N. B. R. 110.

the decrees in equity or admiralty. By the act of March third, eighteen hundred and three, it is declared that from all final judgments or decrees in any of the district courts of the United States, an appeal, where the matter in dispute shall exceed the sum of fifty dollars, shall be allowed to the circuit court; and from all final judgments or decrees rendered in any circuit court, in any cases of equity, admiralty, or maritime jurisdiction, etc., an appeal, where the matter in dispute exceeds two thousand dollars, shall be allowed to the supreme court of the United States, and such appeal shall be subject *to the same rules, regulations and restrictions as are prescribed in the law in cases af writs of error.* This clause adopts the rules, regulations and restrictions contained in the act of seventeen hundred and eighty-nine—the time within which the writ of error must be lodged in the clerk's office, in order to operate as a supersedeas, the citation to the adverse party, the security to be given to the plaintiff in error—the directions in reference to all these things are applicable to appeals under the act of eighteen hundred and three, and are to be *substantially* observed, except where the appeal is made at the same term and in open court, when a citation is not necessary.

Now, it is evident that the twenty-third section of the act of seventeen hundred and eighty-nine cannot be *literally* complied with in cases of appeal. For example, the writ of error or a copy of it cannot be filed for the adverse party in the clerk's office within ten days, for there is no writ of error. Only the spirit of the act of seventeen hundred and eighty-nine can, in many particulars, be carried out. In cases of appeal, the appeal may be taken orally in court. No written application need be made, either in court or to the judge. It is so held by the supreme court in 18 Howard. In such a case, a copy of the writ of error, or copy of anything like a writ of error, or analagous to it cannot be filed.

But it is evident that something must be done by the appellant within ten days, in order to comply with the spirit of the act of seventeen hundred and eighty-nine, that is, he

must take his appeal and present his bond to the court or judge within that time, and he must file in the clerk's office either the bond or some other paper, or an entry must be made upon the minutes of the court, or something else must be done to show that the appeal has been taken within the ten days.

In this case the petition of appeal was presented to the judge within the ten days, accompanied by the bond. The bond was approved by the judge, but the petition of appeal was not allowed, because in his opinion it was not a case for an appeal. The approval of the bond was endorsed by the judge on the bond, and his disallowance of the petition of appeal was endorsed on the petition and both were filed within five days in the clerk's office.

Now, it is evident that the party did all that he could possibly do in order to entitle himself to the protection of the law, except one thing, which he proceeded to do. He repaired to a justice of the supreme court, after having made his application to the judge of the circuit court and having been refused, and thereupon the justice of the supreme court allowed the appeal. A new petition of appeal, it is true, was presented, but the facts were fully stated therein—the fact of the former petition of appeal being presented and overruled, as well as the fact of the decree from which the appeal was taken. The associate justice of the supreme court allowed the appeal, and approved of the identical bond which had been previously presented to and approved by the circuit judge.

This new petition of appeal, with the allowance on it, was filed on twenty-fourth of March, some twenty-one days after the decree was rendered.

Now, the question is whether the allowance of the appeal in this case is to relate back to the time when the original application was made for an appeal to the judge of the circuit court. We are of the opinion that it does; that this party has done everything that in him lay to entitle him to a suspension of proceedings. At any rate, in the circuit court,

which has control over its own processes and proceedings, we can do that which the supreme court would require us to do by supersedeas. Whatever might be the disability or incapacity of a judge at chambers, we are under no such embarrassment. We can direct proceedings to be suspended to the same extent that the supreme court would direct them to be suspended if it were applied to.

There may be some question as to the operation of the supersedeas in this case. The proceedings in bankruptcy are in the district court. A petition was presented to this court for the review of a certain decree or order of the district court. The proceedings in the district court were suspended until that review was had in this court. Upon that review this court came to the conclusion to confirm the decision of the district court. The appeal suspends the operation of that adjudication of the circuit court, and consequently holds the matter in *statu quo*, as if the judge of the circuit court yet held the matter under advisement, and had not made any order in the case. This we consider to be the effect of the appeal as a supersedeas; consequently all facts made or done by either court since the appeal was applied for are to be considered as vacated. If any order is necessary to effect it, it will be made. Matters will remain in *statu quo*, that is, they will remain as they were prior to any decree being rendered by this court.

It is hereby adjudged and decreed that all orders in the above entitled cause made by the circuit or district court since the twenty-first of January, eighteen hundred and seventy, the date of the injunction granted by the circuit judge, are hereby vacated and annulled, and it is ordered that all things be restored to the condition in which they stood at the date of said injunction.

UNITED STATES DISTRICT COURT—N. D: NEW YORK.

A debtor sold his farm for much less than it was actually worth to his father-in-law, who, in turn, deeded it back to the wife for a mere nominal consideration.

At the time of the transfer debtor was largely indebted, but believed himself to be solvent.

The wife repeatedly told her husband these deeds were burned. He so informed his creditors and procured credit of some of those whom he still owed to a considerable amount on the faith of his actual ownership of the farm and his record title. After his insolvency, these deeds were produced and placed on record, thus giving apparent title to the wife.

Debtor was adjudged a bankrupt, filed his schedules without including the farm, and in due time received his discharge.

In an action brought to set it aside, the referee held that the bankrupt had been guilty of concealment and false swearing, within the meaning of section twenty-nine of the present United States bankrupt act, and that the discharge should be set aside and annulled.

In re D. A. RAINSFORD.

The petitioner in this case is a banking association and a creditor of said bankrupt, as stated in its petition, verified in this case by its president on the twenty-seventh day of September, eighteen hundred and seventy. Said petitioner has no knowledge of the alleged fraudulent acts of the said bankrupt stated in his petition, till after the granting of his discharge.

The history of this case, so far as I deem it pertinent to the issues referred to me, is substantially as follows:

On and before January twenty-seventh, eighteen hundred and fifty-eight, the said bankrupt was the owner of the seventy-six acre farm described or referred to in the petition and answer in this case, together with other property, real and personal. On that day he and Mary Jane Rainsford, his wife, executed to Platt Carpenter, her father, a deed of said farm, subject to a mortgage to one Dibble therein mentioned, on which was then owing the sum of two thousand dollars.

The deed expresses no understanding on Carpenter's part to pay this mortgage. He took the title subject to the encumbrance. This deed was acknowledged on the same day, and recorded March twenty-sixth, eighteen hundred and

sixty-six, at ten o'clock A. M., in the proper clerk's office. The consideration expressed is two thousand two hundred and eighty dollars—Carpenter in form paying over to said David A. Rainsford two hundred and eighty dollars and no more. Carpenter never intended to take title for himself, but the avowed and actual object of this deed was to enable Mrs. Rainsford to receive the title from her father as a voluntary conveyance by him to her without consideration, subject only to the said mortgage.

At that time, the testimony fairly considered, shows the farm to be worth at least fifty dollars per acre, making three thousand eight hundred dollars—or one thousand eight hundred dollars over and above the encumbrance.

At the time of this deed to Carpenter, Rainsford's business was, and ever afterwards continued to be, a hazardous species of speculations, so that, as he states in his answer (fol. 10), his assignee, to be hereinafter referred to, and who assumed his trust March twenty-sixth, eighteen hundred and sixty-six, had only realized of said bankrupt's property two thousand dollars, up to October twenty-fifth, eighteen hundred and seventy, while his debts were about twenty thousand dollars on the twenty-fourth day of March, eighteen hundred and sixty-six. He continued his speculations after giving the deed to Carpenter. (Referee's minutes, p. 45).

Carpenter never intended to take possession of this farm, never assumed any control over its occupancy, or its rents, issues or profits, or its care or management. This bankrupt with his family kept possession of it, and ever since eighteen hundred and sixty has resided on it, exercising full and absolute rights of ownership over it, and obtaining property on the faith of it, by the acquiescence of his wife and his father; and such was the intent of the whole transaction. He also paid all taxes and the interest on the mortgage, and within three years after the execution of the deed to Carpenter, he paid five hundred dollars of the principal of said mortgage, leaving still unpaid fifteen hundred dollars of principal. Three hundred dollars of this five hundred dollars

were so paid in eighteen hundred and sixty; and said five hundred dollars constitutes so much property of this debtor.

Simultaneously with the execution of the deed to Carpenter, and as part of one entire arrangement and transaction, a deed of the same lands, subject to the same mortgage, without any assumption to pay it, was drawn from Carpenter and wife to the said Mary Jane Rainsford, which was executed, acknowledged and recorded March twenty-sixth, eighteen hundred and sixty-six.

At this time Rainsford, this bankrupt, was largely indebted, but believed himself solvent; though he was borrowing considerable monies and had lost six hundred dollars or seven hundred dollars on cattle and sheep. He says: (referee's minutes p. 44) he had personal property enough in spring of eighteen hundred and fifty-seven, to straighten up with all, "*except those who would wait.*" He says he paid all his debts in spring of eighteen hundred and fifty- eight, that "were necessary to be paid." He says he paid his debts in eighteen hundred and sixty, and had fifteen hundred dollars left, (p. 33). How this would have been without the beneficial use of the seventy-six acres and the house it furnished, does not appear.

His solvency depended on the hazards of a hazardous and fluctuating business. His was a feverish pecuniary condition. From time to time Mrs. Rainsford told her husband these deeds were burned. He so informed his creditors, and procured credit of some of those whom he still owed to a considerable amount, on the faith of his actual ownership and his record title. This the parties intended he should do. Beyond a rational doubt, the object of this transaction originally was to cast on his creditors the hazard of his speculations, and to provide a family home in case of disaster. Actual results show these speculations in eighteen hundred and sixty-six had produced hopeless insolvency, including this farm of seventy-six acres as assets. See *Carpenter* v. *Roe,* 10 N. Y. Rep. 127; Hind's lessees, 11 Wheat. 199; *Babcock* v. *Eckler,* 24 N. Y. Rep. 630. Subsequent acts and declarations are

competent upon the subject of intent of the original transaction. *Wilson* v. *Fergurson*, 10 How. P. R. 178; *Beattie* v. *Gardner*, 4 N. B. R. 106, and cases and maxims cited by judge Hall at page 109, commencing at foot of first column. "Every person of sound mind is presumed to intend the natural or legal consequences of his deliberate act." Per judge Hall, *in re* Smith, 3 N. B. R. 98. See also Bininger's case, 3 N. B. R. 100, per judge Blatchford, middle column of page 100. This case was affirmed by the United States circuit court, and the same views enforced by judge Woodruff, 4 N. B. R. 77. Also see there cases on the subject of general denials of fraud.

Daniel A. Rainsford kept up an active business in the purchase of produce and farm productions till in the spring of eighteen hundred and sixty-six, all the time exercising undisputed ownership of this seventy-six acre farm, as its conceded owner. On the twenty-second day of March, eighteen hundred and sixty-six, he made up his mind to make an assignment for the benefit of some of his creditors —in form for all—in fact, by its preferential effect, for the benefit of a favored few. He denies he said he so intended on the twenty-second of March, eighteen hundred and sixty-six, but a reputable witness swears he did, and Rainsford may forget. At all events, on the twenty-third day of March, eighteen hundred and sixty-six, he employed Messrs. Ives & Harris, of Rochester, to draw such an assignment for him, which was accordingly drawn on the twenty-fourth, and executed that day and sent by his son to the assignee.

On the twenty-third he procured one thousand dollars, less discount, from the Flour City Bank of Rochester on his draft on S. W. Settle, his consignee at Albany, on whom he had drawn other drafts on and about the nineteenth of March, making in all three thousand drawn on him and outstanding on the twenty-fourth of March eighteen hundred and sixty-six.

He had not settled with this consignee in about a year, and had an open account with him of some one hundred and

fifty thousand dollars. The account afterwards rendered by this consignee, without payment of any of these drafts, showed a balance in Rainford's favor of four hundred dollars or five hundred dollars, which was paid to his assignee named in said assignment of March twenty-sixth, eighteen hundred and sixty-six. In this assignment he included this seventy-six acre farm as a part of his property, believing it to be his as absolute owner, and that the deeds were burned, which, in his opinion, re-invested him with its title.

On the twenty-third March, eighteen hundred and sixty-six, he purchased a gold watch in Rochester, paying in part therefor by a note of one hundred and fifty dollars he held, and by a credit given to himself for a short time of fifty dollars; showing money, but stating it as a convenience to have a little credit. On the day before he made his assignment he had three thousand dollars on hand, and nobody was pressing him. This sum of three thousand dollars he gave to his son, Edgar M. Rainsford, to pay, as D. A. Rainsford claims, a debt to Merrick Sheldon, who married his niece and resided at Mount Morris, eleven hundred and fifty dollars with the gold watch; sixteen hundred and eighteen dollars and forty eight cents to Edgar, claiming that he owed them these amounts substantially; and the residue of said three thousand dollars, to pay small debts. He intended by these transactions and his assignment to pay off *all his relations as far as he could.* (Parker's minutes, page 10). His assignee is his wife's brother who is a preferred creditor in the sum of seventeen hundred dollars, and a rather loose, vague and unsatisfactory statement of indebtedness. Soon after that he confessed judgment to this assignee for two thousand seven hundred and forty-four dollars and fifty-five cents, to give him a preference in the race of creditors. (Parker's minutes, page 8-9). His son, Edgar M. Rainsford, in March, eighteen hundred and sixty-six, was about twenty-two years of age. (Parker's minutes, page 55).

Having put his assignment in the hands of a son for delivery to his assignee and brother-in-law, on Saturday, the

twenty-fourth of March, eighteen hundred and sixty-six, at Rochester, he himself went to Sheldon's at Mount Morris, and started him the next morning in pursuit of the watch and money. (Parker's minutes, p. 56-7). There is no evidence he ever got them other than hearsay. (See p. 56.) Rainsford says: "I could not swear that he ever got the watch or money." He stayed at Sheldon's till about noon of Wednesday, March twenty-eight, and returned to his residence in Victor; and on twenty-ninth March, eighteen hundred and sixty-six, made a supplemental schedule to his assignment, relieving it of the seventy-six acre farm.

It is a pleasant feature of this case to notice how affectionate this family was when property formed the basis of cohesion. Mrs. Rainsford's brother finds himself possessed of an assignment from her husband. Mrs. Rainsford and her father of a sudden discover that the old deeds after all were not burned, as the creditors had been told, but were in bodily existence. They

> Mount from their funeral pyre on wings of flame,
> And soar and shine no other but the same;

eclipsing the Phœnix in the performance. Carpenter, the father, executes his deed to his daughter March twenty-six, eighteen hundred and sixty-six, and gets it on record with that to himself, half an hour before Carpenter, the brother, who is slower of foot, gets his assignment on record. The fable of the Phœnix is fable no longer, as the records of Ontario county show.

Mr. Rainsford gets home on or about the twenty-ninth of March, eighteen hundred and sixty-six, after having made his opportune visit to his nephew and niece at Mount Morris. On that day he supplements his assignment to meet the exigencies of these records, and accepts the hospitalities of his wife's home, whose familiar features all resemble his old homestead. Instead of saying to his wife, your deeds are dormant, and I have with your and your father's consent and aid, been trusted by creditors who have given me their credit,

and money and property on the faith of this house and farm, and good faith requires its surrender to them, he accepts the situation; having a few days before told a creditor he had nothing to pay with, but would get millions for defence. (Parker's minutes, p. 65.)

This farm of seventy-six acres had increased in value, and it is a mockery of creditors to say that as against them this farm over and above the fifteen hundred dollar mortgage was not his property. If he had prospered, the deeds were ashes; having failed, they were records. This will not do. What I have referred to as "Parker's minutes," is the testimony of Mr. Rainsford taken before Mr. G. T. Parker, referee, in proceedings on his petition for his discharge from execution for a conversion of the oats of William Wager, a judgment creditor.

I omitted to notice that on Monday, March twenty-sixth, eighteen hundred and sixty-six, the assignee telegraphed the Albany consignee of the assignment; and Rainsford's drafts on him were all dishonored.

The petitioner in this case states willful false swearing in the affidavits to schedule B in bankruptcy and in his final affidavit for discharge. Second. A concealment of his property and its reservation for himself and family.

All that he did in respect to his assignment originally was done under the advice of Messrs. Ives and Harris. The supplemental schedule and the bankruptcy proceedings under the advice of Mr. E. M. Morse, of Canandaigua, who appears as his counsel before me.

It is urged that perjury cannot be assigned upon an oath made under the advice of counsel. 2 Wharton, s. 2204; 3 McLean, 573; 4 Keyes, 397; see also 57 Barb. 625.

Assuming this to be so, it is obvious that the bankrupt act, as well as common sense, makes a distinction between willfully swearing false in these affidavits and the crime of perjury. See sec. 29. Perjury is the willfully and *corruptly* swearing false. Sec. 7. Corruption is an element of crime. The advice of counsel may shield a client from *corrupt* in-

tent, but cannot adjust the rights of property as between him and his creditors, or relieve him from the fact that he actually intended what he did. It is claimed that his oath that he had no assets and had stated all his property in the bankruptcy proceedings, and his final affidavit, are willfully false. The final affidavit states that he had not made fraudulent payment, gift, transfer, conveyance or assignment of any part of his property, and had made no fraudulent preference, or been guilty of any fraud contrary to the true intent and meaning of the act. See rule 49 N. D. New York.

The act also avoids a discharge where the debtor has concealed any part of his estate. Sec. 29.

This is the principal question in this case, for if, under the circumstances, he has done this within the true intent and meaning of the act, he swore willfully false in the sense of deliberate intention, though he may not have committed perjury.

It will be observed that what would prevent will invalidate a discharge, if the appropriate remedy be sought, as it is in this case. 57 Barb. 249.

In the proceeding in which Mr. Parker took testimony, it was held by the supreme court, at the June special term, eighteen hundred and sixty-eight, justice E. Darwin Smith, giving his opinion, that the deeds to Carpenter and by him to Mrs. Rainsford, were fraudulent and void as to the creditors of Rainsford, being a voluntary conveyance of property held in trust for and to the use of the debtor and his family, and that those deeds were dormant as to creditors. See *Penn* v. *Dunn*, 3 J. C. R. 508.

In re Hussman, 2 N. B. R. 140, Ballard, J., says: "A fraudulent conveyance, I have already said, made by a debtor anterior to the passage of the bankruptcy statute, will not of itself preclude his discharge; but in such case he should not conceal nor attempt to conceal the frand when he comes to ask the benefit of the statute. He should come into court with clean hands, or at least with a clear conscience, and disclose fully all property and rights of property which his

creditors may appropriate in satisfaction of their claims," and holds the fraud continuous.

Section fourteen vests in the assignee all property conveyed by the bankrupt in fraud of his creditors. See also 2 N. B. R. 141. In *Martin* v. *Smith*, 4 N. B. R. 83, the circuit court of Missouri held that the fraud was continuous. In that case the court says, at p. 86: "Equity looks at substance, and not form. It penetrates beyond externals to the substance of things, and it accounts as nothing, and delights to brush away barricades of written articles and formal documents, when satisfied they have been devised to conceal or protect fraud." *In re* Myers, by Blatchford J., 1 N. B. R. 162, is a case of husband and wife, worth considering in this.

An instructive case is, *in re* Adams, 3 N. B. R. 139, where judge Lowell, of Massachusetts, says: "If the bankrupt and his wife had surrendered this property as soon as the mistake was discovered, the case would stand very differently," and proceeds to make other statements I will not quote, but which are worth studying. Keep in mind that Rainsford eagerly availed himself of this fraudulent record as to creditors on discovery, and did not seek to adapt himself to the honesty of the transaction, but to adapt his schedule to the record, to the exclusion of his creditors, and the swearing the home farm to himself and family. See also *in re* Broadhead, 2 N. B. R. 93; *in re* Rathbone, 1 N. B. R. 145; s. c. 2 N. B. R. 89; *in re* Hill, 1 N. B. R. 114; *in re* Goodridge, 2 N. B. R. 105; *Goodwin* v. *Sharkey*, 3 N. B. R. 138; Bump on Bankruptcy, 3d ed. 298, 299, 376, 377, and cases cited.

It is none the less voidable where there is a pecuniary consideration, where the element of good faith is wanting. *Lukins* v. *Aird*, 6 Wallace, 78; s. c. 2 N. B. R. 27, 28, and cases cited.

It can hardly be necessary to pursue this investigation further. Here was a secret deed, not only unknown to but deliberately concealed from creditors whom Rainsford purposely informed it was destroyed and that he had title,

till the question arose between Rainsford and his creditors, and then it was galvanized into an apparent vitality, by some method known, doubtless, to the brother of Mrs. Rainsford, and for the very purpose of defeating creditors who had confided in Rainsford's title, by the acquiescence, and aid of his wife and her father. The primary and cardinal idea of the bankrupt law is equality among creditors, and it reverences that old mother of many commercial virtues—Good Faith.

The special term of the supreme court, in a direct proceeding to which Rainsford was a party on his own petition, has held him guilty of the fraud. I need not decide how much weight should be given to this decision which remains unreversed. See Hussman's case, 2 N. B. R. 140.

The course the trial of this case has taken before me, makes it proper that I should say, that whatever may be the weight of authority of this decision, the judge who pronounced the opinion is of conceded eminent legal ability, and howsoever tried or tempted, is of inflexible integrity.

I feel not only justified, but called upon to say, that I regard a debtor who has had his neighbor's credit, or money or other property to his own use, for which he makes no pecuniary return, can at least afford in his bearing toward such a creditor to introduce into it the element of civility. I do not mean cringing, but simple courtesy.

The debtor owes an active duty to his creditor. A creditor who has had flouted in his face the taunt of "nothing to pay but millions for defence," has a right to feel that his rights and the laws of decorum are violated. Honesty inverts the expression in its substantial effect—all for payment and nothing for resistance, hindrance or delay to the collection or payment of an honest debt. Honesty comes without dissimulation or disguise, and invites the amplest investigation. No dark chamber hides from enquiring creditors any secrets in regard to property. But this respondent has gone further. Reputable gentlemen, who are his creditors and strove to be his friends, have been assailed persistently, simply because they seek in legal modes, the redress equity desires to afford

them. They come into court with clean hands and consciences, and find a debtor there who seeks to intimidate them by threats and abuse. Fraud has become so much the rule in some men's minds, that they seem to think a creditor, whose property they have consumed without equivalent, has no rights a scheming debtor is bound to respect. It is time this indecorous mode of warfare ceased.

Two centuries ago old John Bunyan treated the world to the following colloquy in his "Life and Death of Mr. Badman:"

WISEMAN.—He (Badman) gives a great and sudden rush into several men's debt to the value of about four or five thousand pounds, driving at the same time a very great trade, by selling many things for less than they cost him, to get custom, therewith to blind his creditors' eyes. His creditors, therefore, seeing that he had a great employ and dreaming that it must at length turn to a very good account to them, trusted him freely, without mistrust, and so did others, too, to the value of what was mentioned before. Well, when Mr. Badman had well feathered his nest with other men's goods and money, after a little while he breaks.

After showing how he affects a fraudulent compromise, good old Bunyan adds, by Wiseman's mouth:

So the money was produced, releases and discharges drawn, signed, and sealed, books crossed and all things confirmed; and then Mr. Badman can put his head out of doors again, and be a better man than when he shut up shop by several thousand pounds.

ATTENTIVE.—And did he thus indeed?

W.—Yes; once and again. I think he broke twice or thrice.

A.—And did he do it before he had need to do it?

W.—Need! What do you mean by need? There is no need at any time for a man to play the knave. He did it of a wicked mind to defraud and beguile his creditors. * * *

A.—Why this was a mere cheat.

W.—It was a cheat indeed. This way of breaking is nothing else but a more neat way of thieving, of picking of pockets, of breaking open of shops, and of taking from men what one has nothing to do with. No man that has conscience to God or man can ever be his craftsmaster in this hellish art. * * * He could make them glad to take a crown for a pound's worth, and a thousand for that for which he had promised before to give them four thousand pounds.

A.—This argueth that Mr. Badman had but little conscience.

W.—This argueth that Mr. Badman had no conscience at all; for conscience, the last spark of a good conscience, cannot endure this.

So much from Bunyan. I ought perhaps to add that soón after his assignment, Rainsford was indicted in Ontario county, for obtaining money under false pretences. The claim on the civil side was settled with the claimant by his (Rainsford's) wife, and an arrangement perfected with the creditor—a bank at Canandaigua—to carry along the business to be done by Rainsford, the paper being given by the wife. Rainsford kept on as aforetime, enjoying this property and other real estate bid in by him for her on the assignee's sale, the creditors, meanwhile, being kept at bay. The indictment, of course, never was tried.

If such misdemeanors can be upheld in law and equity, commercial integrity and creditors' rights are among the things of the past. The law in its stern sense of justice does not tolerate them.

I have no hesitation to hold that this bankrupt did willfully swear falsely in his said several affidavits, in the manner above stated, and did conceal his estate, as alleged in the petition, within the true intent and meaning of the bankrupt act, and that the prayer of the said petitioner should be granted. I have omitted many matters proved, regarding

those stated as sufficient to elucidate the line of thought I have adopted, and the conclusion reached.

The discharge should be set aside and annulled.

J. D. HUSBANDS, *Referee.*

JOHN VAN VOORHIS, for creditor.
E. M. MORSE, for bankrupt.
February 5th, 1871.

UNITED STATES DISTRICT COURT—S. D. OF NEW YORK.

It is no sufficient excuse for not answering a question put to the bankrupt that he has already replied to it at a former examination held at the instance of some other creditor or the assignee.

*In re H. VOGEL.**

On the examination of Henry Vogel, the bankrupt above named, pursuant to the order of the court made in the bankruptcy on the seventh day of January, eighteen hundred and seventy, hereto prefixed. The examining creditor appears by Foster & Thompson, Esqs., his counsel.

The bankrupt appears by Townsend, Dyett & Goldsmith, Esqs., his counsel.

The bankrupt does not attend in person. On motion of counsel for the examining creditor, the default of the bankrupt is entered. On application of counsel for the bankrupt, the proceedings on the foregoing order are adjourned to Friday, January twenty-first, eighteen hundred and seventy, at eleven o'clock A. M. The default of the bankrupt attends and submits to examination.

Friday, January twenty-first, eighteen hundred and seventy. Present, the register, the examining creditor by his counsel, and the bankrupt by his counsel. Proceedings adjourned by consent to Monday, January twenty-fourth, eighteen hundred and seventy, at twelve o'clock M.

* See 2 N. B. R. 138; 3 N. B. R. 49.

January twenty-fourth, eighteen hundred and seventy. The bankrupt appears in person and by Mr. Dyett.

The said Henry Vogel having been sworn, on being examined testified as follows:

QUESTION.—Your name is Henry Vogel?

ANSWER.—Yes, sir.

Q.—How old are you?

A.—My age is thirty-four.

Adjourned, on application of examining creditor to Tuesday, February first, eighteen hundred and seventy, at twelve o'clock noon.

Present, the register. The examining creditor appears by Mr. Thompson. Adjourned, on application of bankrupt, on account of the absence of his counsel, to Thursday February third, eighteen hundred and seventy, at twelve M.

Thursday, third February, eighteen hundred and seventy, at twelve M.

Present, the register. The bankrupt in person and by his counsel. And the examination of the bankrupt is proceeded with as follows:

Q.—Where do you reside?

A.—At one hundred and fifty-seven east sixty-fifth street.

Adjourned, by counsel, to Wednesday, fourteenth February, eighteen hundred and seventy, at three P. M.

Monday, twelfth February, eighteen hundred and seventy, three o'clock P. M.

The further examination of the bankrupt is proceeded with as follows, by counsel for examining creditor:

Q.—In your last examination you stated your present place of residence. How long have you resided there?

A.—Since the first of last May.

Q.—Do you own the house, if not, who does own it?

A.—I do not. Jacob Korn does.

Q.—Have you a lease of that house?

A.—I rent it. Yes, sir.

Q.—Was the agreement to rent it to you in writing?

A.—Yes, sir.

Q.—When does the lease expire?

Objected to by counsel for the bankrupt, as immaterial. In the opinion of the register, the question should be answered. The bankrupt, by advice of his counsel, refuses to answer, on the ground that the question is irrelevant, because it appears that the lease was taken in May, eighteen hundred and sixty-nine, long subsequent to the date of the bankrupt's petition.

Q.—Are you a man of family? and if so, state the name of your wife, the names and ages of your children.

Objected to, as the question was fully answered a year ago in one of the examinations of the witness. In the opinion of the register, the question should be answered. The bankrupt, by advice of his counsel, refuses to answer, on the ground that the question has been answered.

Q.—You have been in business on your own account, previous to the filing of your petition under the bankrupt law?

Objected to, on the same grounds as the last question. In the opinion of the register the question should be answered. The bankrupt, by advice of his counsel, declines to answer, on the ground that the question has already been answered.

Q.—Since you filed your petition in bankruptcy, have you settled with any of your creditors, or have any of the claims against you been bought up at your instance?

Objected to as irrelevant. In the opinion of the register the question ought to be answered.

A.—I have not settled with any of my creditors, nor has any of the claims been bought up at my instance.

Q.—Has your brother bought any claims against you?

Objected to. In the opinion of the register, the question is relevant. The bankrupt, by advice of his counsel, refuses to answer.

Q.—Is your brother a creditor of yours, and if so, what claim does he hold against you?

Objected to as immaterial and irrelevant. The register decided that the question should be answered. The bankrupt, by advice of his counsel, declined to answer the ques-

tion, and therefore, with his counsel, and by his advice, left the office of the register, the counsel for the creditor stating that he protested against the bankrupt leaving.

The undersigned, one of the registers of the district court of the United States, for the southern district of New York, in bankruptcy, hereby certifies, that upon the examination of Henry Vogel, the bankrupt above named, under and pursuant to the order for the examination of the said bankrupt hereto prefixed, the objections on the part of the bankrupt to questions put to the bankrupt by the counsel for the examining creditors were made; the refusals by the bankrupt to answer questions put to the bankrupt by counsel for the examining creditors took place, and the proceedings were had before the undersigned, which are above recited and set forth and in the order and manner above set forth.

ISAAC DAYTON, *Register.*

February 27, 1871.

The undersigned submits the following reflections upon the objections taken on the examination set forth in the foregoing certificate:

The twenty-sixth section of the bankrupt act entitles any creditor to an order for the examination of the bankrupt. The fact that one creditor has examined the bankrupt is not a reason for withholding the privilege from another creditor. *In re* Adams, 2 N. B. R. 92; *in re* Gilbert, 3 N. B. R. 37.

The assignee in bankruptcy and a creditor stand upon the same footing as to their rights, under this section of the statue. The particular province of the assignee is to examine the bankrupt as to the disposition, condition and amount of his property, and the debts due to and owing by him, so as to enable him to get in the assets. A creditor examines the bankrupt, not only for the purpose of discovering property, but more especially to elicit facts upon which objections to the discharge of the bankrupt can be alleged. A creditor therefore has, it is apprehended, under this section of the

statute, the right to examine the bankrupt, although the assignee may have already examined him, nor where two creditors, or the assignee and a creditor, examine the bankrupt at different times, does the statute impose any regulations or restictions upon the party, exacting the second examination because of the previous examination of the bankrupt, omitting all account of the right, which, under reasonable regulation, the examining counsel has on cross-examination, or on an examination in the nature of a cross-examination of testing the memory and veracity of a person under examination by putting questions previously answered, this statute would become of little or no practical efficacy if every creditor, on examining a bankrupt, should be required to investigate all previous examinations of the bankrupt, and so to shape every question as not to be liable to an objection that the bankrupt has answered that question on such previous examination. Each creditor must, without reference to anything which may have been done by any other creditor, be allowed to put his question in his own way, otherwise, the creditor first examining the bankrupt monopolises, perhaps, in a very large measure, the rights by the section of the statute in terms conferred upon all the creditors of the bankrupt. The time, manner and cause of the examination are to be regulated so as to protect the bankrupt from oppression, unnecessary annoyance and mere delay. *In re* Gilbert, 3 N. B. R. 37. But the bankrupt is asking, under the bankrupt act, at the hands of the court, a discharge from his debts. In view of the object for which he has invoked the statute, the bankrupt is not warranted in regarding it as oppressive or unduly annoying if every one of his creditors exercises his right under the statute of investigating the condition, affairs and dealings of the bankrupt, and ascertaining whether he has brought himself within the remedial provision of this statute, and is entitled to its benefit. In the judgment of the undersigned, therefore, the bankrupt was not, because of his having answered the same questions on a previous

examination, exempted from answering the questions put to him by the counsel for the examining creditor on this examination.

It should be further considered that there was not before the undersigned on this examination any evidence that as a matter of fact the bankrupt had in the course of any previous examination answered the same questions which were put to him on this examination. The court clearly would not be justified in holding that the bankrupt should be excused from answering a question put to him by a creditor, upon the mere recollection of the register, as to what had taken place on a previous examination of the bankrupt. Supposing such previous examination to be before the court, on the second examination of the bankrupt, if the position taken by the bankrupt in the present proceeding is correct, the court would be obliged as each question should be asked to peruse that examination and inform itself as to all the questions put to and answered by the bankrupt on such previous examination, and to determine points sometimes nice and doubtful, and requiring for their decision, perhaps, a scrutiny of all the disclosures made by the bankrupt in the whole course of that previous examination, as to whether the questions on the two examinations are exactly the same and particularly whether the statements made by the bankrupt have been full, frank and explicit answers to such questions. The adoption of such a practice would be liable to lead to abuses and would be virtually a denial of the rights given to all the creditors of the bankrupt by the twenty-sixth section of the statute, and an examination so conducted instead of being a privilege to the creditors, would be alike to the court and to the examining creditors a most embarrassing and tedious labor.

The conduct of the bankrupt in the present case, in withdrawing from the office of the register, as stated in the foregoing certificate, was a contempt of the court. It has been in the hope that the bankrupt would recognize the

extreme impropriety of his conduct on that occasion, and again attend before the register for examination, that the preparation of the foregoing certificate has been delayed.

ISAAC DAYTON, *Register.*

BLATCHFORD, J.—I concur in the views of the register and the questions must be answered.

March 7th, 1871.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

An agreement to sell an individual certain specific articles expressly for his individual use and consumption, to be paid for out of the partnership goods of the firm, is void as to the other partners.

Such an arrangement, made without the knowledge, assent or approval of his copartners, is therefore fraudulent and void as to them.

A demurrer to a bill in equity brought by the assignee, on the ground that complainant has a complete remedy at law, will be overruled where the facts show that questions of fraud, trust and partnership are all involved in the case at issue.

TAYLOR, assignee, v. *RASCH & BERNART.*

On demurrer to the bill of complaint.

The bill sets up that Tillman and Silsbee, as the partners composing the firm of Tillman, Silsbee & Co., were adjudged bankrupts in the district court of the United States for the eastern district of Michigan, June thirtieth, eighteen hundred and seventy, and the complainant was appointed assignee July fifteenth, eighteen hundred and seventy; that the said firm, while it existed, was engaged in business at Detroit, in said district, in the manufacture and sale of household furniture; that Tillman and Silsbee were the general partners in the firm, and that John S. Newberry, of Detroit, was a special partner therein; that the firm was a limited partnership, and was formed under the statutes of Michigan, August fifth, eighteen hundred and sixty-seven, and was to continue until March first, eighteen hundred and seventy-three, and was duly published; that the defendants were partners,

doing business at Detroit under the firm name of Rasch & Bernart, in the manufacture and sale of men's clothing.

The bill then charges, "that on or about the eighteenth day of September, eighteen hundred and sixty-nine, the said William Tillman individually entered into an arrangement with the said defendants to the following effect: that he, the said Tillman, would purchase clothing from them for his own private use and consumption, and that they, the said defendants, would and should, in payment therefor, purchase and receive furniture from the said firm of Tillman, Silsbee & Co. to a like value and amount." That in pursuance of said arrangement the said Tillman afterwards purchased from the defendants, for his own private use, clothing to the value of four hundred and thirty-eight dollars. That the defendants afterwards obtained furniture from the store and stock of Tillman, Silsbee & Co. to the amount and value in all of five hundred and twenty-three dollars and twenty-five cents, as follows: April twenty-third, eighteen hundred and seventy, three hundred and sixty-nine dollars and twenty-five cents, and May twenty-first, eighteen hundred and seventy, one hundred and fifty-four dollars.

The bill further alleges, "that of the amount so received by the defendants (five hundred and twenty-three dollars and twenty-five cents) the sum of fifty dollars was paid in clothing sold and delivered by Rasch & Bernart to an employee of the said firm, and duly accounted for by him, leaving a balance of four hundred and seventy-three dollars and twenty-five cents."

The bill charges that the said arrangement was so made and the furniture was so delivered without the knowledge, consent or approval of either of Silsbee or Newberry. That at the time the furniture was delivered the firm of Tillman, Silsbee & Co. was insolvent, and at the time the arrangement was made the firm had met with losses, its capital was impaired and it was indebted to large amounts. That Tillman had no right or authority to withdraw funds or property for his own private use, or to appropriate the same to the

payment of his private debts, but on the contrary had largely overdrawn his account and was largely indebted to the firm. That the said arrangement and delivery of furniture in pursuance of it were not within the scope or course of business of the firm of Tillman, Silsbee & Co., which fact the defendants well knew.

The bill sets up that the defendants have offered to pay to the complainant the balance of furniture obtained by them over and above the clothing and the credit of fifty dollars, but that complainant has declined to receive the same, and has required defendant to pay the full value of the furniture, less the said credit of fifty dollars. That the assets of the bankrupts are not sufficient to pay the firm debts, and the full amount and value of the said furniture will be needed for that purpose.

The bill claims that the arrangement between Tillman and defendants was wholly unwarranted and illegal as against Silsbee and Newberry, and as against complainant as assignee. That the delivery and receipt of the furniture under the arrangement was and is to be deemed a fraud upon Silsbee and Newberry, and passed no title in the same to the defendants, and that the same should be deemed assets of the said firm.

Prayer, that the arrangement be set aside; that the defendants be decreed to hold the furniture in trust for Silsbee and Newberry and complainant, and to produce and surrender the same to complainant, and to pay for the use and enjoyment of the same, or that they pay the full value thereof, less the said credit of fifty dollars, with interest, and for general relief.

The demurrer is general to the equity of the bill. On the argument the following grounds of demurrer were insisted on:

1. As appears by the bill the arrangement made by Tillman with the defendants was according to the ordinary course of the partnership business.

2. The partner Tillman, as the general agent of the firm, had authority to make the arrangement.

3. If the arrangement was not valid, complainant has a complete remedy at law, and equity has no jurisdiction.

MR. TOWLE for complainant; MR. KIRCHNER for defendants.

LONGYEAR, J.—The first ground of demurrer is based upon the well settled rule of law that if any one holds another out to the world as having authority to do certain things in his behalf, and such other person obtains credit in consequence thereof, he will not be permitted to deny that such person had the requisite authority; and it is predicated on the allegation in the bill of credit of fifty dollars given to to the defendants by the bankrupts in consequence of a payment made by them in clothing to an employee of the firm and duly accounted for by him. It is argued, the firm having thus recognized the authority of an employee to receive pay from the defendants in clothing on account, *a fortiori*, the defendants had a right to assume that a similar arrangement made by one of the partners would be recognized, or at least that it is evidence that such was the ordinary course of the business of the firm.

This argument is based upon the following assumptions:

FIRST. That the transaction with the employee was before the transaction with Tillman. This assumption is not supported by the bill, but by necessary inference is rebutted. The statement in the bill is, that the fifty dollars paid by the defendants to the employee was "of the amount so received by the defendants," but none of this amount was received by the defendants until several months after the original transaction between them and Tillman.

SECOND.—That the credit of fifty dollars was given to defendants solely on account of the payment made by them to the employee. Neither is this assumption supported by the bill. The statement in the bill is that the fifty dollars was paid "to an employee of the firm and duly accounted for by him." The necessary inference is, that the credit was given because the amount paid to the employee was accounted

for by him. It is but another form of stating that fifty dollars had been paid to the credit of defendants by an employee of the firm. The balance of the statement is mere matter of detail, entirely unnecessary to the understanding of that portion of the case made by the bill.

In the case of *Hazzard* v. *Treadwell*, 1 Strange, 507, relied on by defendants' counsel, the servant had been sent by his employer with authority to obtain the goods on the employer's credit. It was held that on a second application by the same servant the party applied to had the right to assume that he came with the same authority, although, in fact, he did not, and the employer was held liable for goods delivered to the servant on such second application. That is very different from a case like the present, where the transaction in question was long anterior to the transaction on account of which it is sought to be justified; where, in fact, no credit was given, but simply a payment made on a prior indebtedness; where no previous authority to the employee to receive pay for his employer in that manner appears, and where the credit given the defendants for the amount so paid to the employee appears to have been given only when accounted for by him.

The first ground of demurrer is not sustained.

The second ground of demurrer is, that the partner Tillman, as the general agent of the firm, had authority to make the arrangement with the defendants.

The commendable energy of counsel on both sides, manifested in their research for, and citation of, decisions relating to this proposition, as well as in their able arguments, has been of much aid to the court in arriving at a conclusion.

It is conceded that an individual partner cannot bind the concern by a note or contract given or made for his individual debt, or use and benefit, without the consent of his copartners, express or implied; nor can he, without such consent, use partnership funds or property to pay a prior individual debt; nor can he, without such consent, cancel an

indebtedness to the firm by crediting upon its books an individual indebtedness of himself.

But it is contended that a sale of goods in the ordinary course of the partnership business, under a contemporaneous or prior arrangement with the purchaser to pay for them in specific articles, is within the general powers of each individual partner, and that the fact that such specific articles were taken and used by such individual partner will not affect the validity of the sale; that in such case the firm must look to such individual partner for reimbursement.

This, as an abstract proposition, is no doubt correct. In such case, the purchaser of the partnership goods sells his specific articles to the firm, and it is no concern of his what disposition is afterwards made of them. He does the business, it is true, with an individual member of the firm, and perhaps delivers the articles to him individually and upon his separate premises. But even this does not alter the case. See *McKee* v. *Stroup*, Rice, S. C. 291. If this were all there is of the present case, there would be no difficulty in holding the transaction between Tillman and the defendants valid. The difficulty in the case lies in the fact that the agreement was to sell to the individual partner Tillman, not to the firm, certain specific articles, expressly for his individual use and consumption, to be paid for out of partnership goods of the firm of Tillman, Silsbee & Co. I can see no difference in principle between this case and that of an agreement to pay an individual prior indebtedness out of partnership funds. In the one case the indebtedness exists when the agreement is made. In the other the indebtedness is to follow the agreement. It is just as much an individual transaction in the one case as in the other, and each must be held invalid in the same circumstances, equally with the other. The bill expressly negatives the knowledge, assent or approval of the other partners, and alleges knowledge in the defendants that the arrangement made by Tillman with them was not in accordance with the usual scope or course of dealing of the partnership. The current of authority and of decisions in

this country, almost without exception, unites in denouncing such a transaction as fraudulent and void, as to the other partners.

Mr. Parsons, in his treatise on partnerships, makes use of the following language: "Instances of partners using the name or credit of the firm for their personal advantage and without authority, are constantly occurring; and as we have seen, when this is known to persons dealing with them, the firm are not held. Some difficulty often arises as to the proof of such knowledge on the part of the creditor. There is a rule, however, which rests on much authority, and is in itself reasonable, just and convenient, which would settle the most of these cases, or at least reduce them to mere questions of fact. It is, that whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time" (thus including the very case here under consideration) "or before existing, or by way of settlement of, or security for, a debt or indebtedness, or obligation of the firm in any form" (thus putting this case and the others all in the same category), "the presumption of the law is that the partner gives this and the creditor receives it in fraud of the partnership, and has consequently no demand upon them." See also the numerous authorities cited by the author in the note. Also Story on Part'ps, sec. 132; *Homer* v. *Wood*, 11 Cush. 62, 64.

It is competent, of course, for the defendants to rebut this presumption by showing the express or implied assent of the other partners to the arrangement. But without such showing the arrangement clearly cannot be upheld. In each of the numerous adjudicated cases cited by counsel, with but two exceptions, such assent, or its absence, constituted the basis of, or at least an essential element in the decision. The exceptional cases are *Strong* v. *Fish*, 13 Vt. 277, and *Eaton* v. *Shaw*, 17 Vt. 641. In these cases the subject of assent was not discussed or noticed, and the arrangement was upheld. The reasoning and conclusion, however, are entirely unsatisfactory, and I cannot regard them as sound.

In the latter case, chief justice Williams delivered a dissenting opinion, which I regard as laying down the law much more in accordance with the current of decisions.

As at present appears the arrangement between Tillman and the defendants was not within the scope and course of the partnership business, which was known to the defendants, and was made without the knowledge, assent or approval of his copartners, and the same is therefore fraudulent and void as to them.

The second ground of demurrer is therefore not sustained.

The third ground of demurrer is, that if the arrangement was not valid, complainant has a complete remedy at law, and equity has no jurisdiction.

Cases were cited upon the argument in which actions at law had been brought and sustained in such cases, but in none of them was the question raised. In no case, however, where there was a separate equity jurisdiction, in which the question was raised, has the action at law been maintained; and in nearly every case in which the question has been so raised, equity jurisdiction has been directly asserted or strongly intimated. In an action at law the defrauding partner must be made a party plaintiff, together with his copartners, and the action is denied on the familiar rule of law that a party to a fraudulent transaction cannot himself seek to set it aside. The remedy in such cases is to the innocent defrauded partners, which cannot be sought at law and can be sought only in equity. As we have seen, the arrangement between Tillman and the defendants was presumptively fraudulent. A fraudulent purchaser may be held a mere trustee for the innocent owners or part owners. 2 Story's Eq. Jur. sec. 265. The case here involves to same extent the litigation of partnership relations among the partners themselves. We have, therefore, these three grounds of equity jurisdiction, viz: fraud, trust and partnership. Sec. 1 Story's Eq. Jur. 681; Collyer on Part'p, sec. 643; Story on Part'p, sec. 238 and note 4; *Jones* v. *Yates*, 9 B. & C. 532; *Greeley* v. *Wyeth*, 10 N. H. 15, 19; *Pennock* v. *Yeager*,

5 Phila. Rep. 171; *Homer* v. *Wood*, 11 Cush. 62; *Easterbrook* v. *Messersmith*, 18 Wis. 445, 450; *Fellows* v. *Wyman*, 33 N. H. 351, 358.

So much as to the rights and remedies of the partners in such cases. Here the remedy is sought by the assignee in bankruptcy of the firm for the benefit of creditors. Partnership creditors must be first paid out of the partnership property. Such preference, while it creates no lien, strictly speaking, on such property, may be worked out through the partners. In the ordinary creditors' bill the suit for that purpose is brought by the creditors themselves. The assignee in bankruptcy represents the creditors, and hence the suit is brought in his name. In fact, bankruptcy proceedings are in the nature of a general execution for all the creditors; and an effectual lien is created thereby for their benefit, to be enforced by and through the assignee. The creditors may pursue partnership property which has not been legally parted with into whosoever hands it may be. Under the present bankrupt law this must be done through the assignee. And where, as in this case, property has been placed beyond his reach by action at law, and the right thereto being, as we have seen, a right in equity merely, the same must be reached through the courts of equity, as is sought to be done in this case. "All rights in equity" of the bankrupts pass to the assignee by express provision of the bankrupt act, section fourteen. See 1 Story's Eq. Jur. sec. 675; 2 ib. 1253; Story on Part'p, secs. 97, 326, 360; *Sands* v. *Codwise*, 4 J. R. 536, 556; *ex parte* Stokes, 7 Ves. Jr. 408; *Clements* v. *Moore*, 6 Wall. 299, 312; *Halbert* v. *Grant*, 4 T. B. Monroe, 481; *Mallock* v. *James*, 13 Beasley, N. J. 126; *Hoxie* v. *Carr*, 1 Sum. 173, 183, 192; *Miner* v. *Pierce*, 38 Vt. 610; *Hawkeye Woolen Mills* v. *Conklin*, 26 Iowa, 422; *Fleck* v. *Charron*, 29 Md. 318; *Cooker* v. *Cooker*, 46 Me. 250, 259; *Ferson* v. *Monroe*, 21 N. H. 462; *Benson* v. *Ela*, 35 N. H. 463, 410; *Tenny* v. *Johnson*, 43 N. H. 144, 147.

The third ground of demurrer is therefore not sustained.

The demurrer is overruled with costs, and the defendants have leave to answer within thirty days.—October 3, 1871.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

The stockholders of a trading corporation agreed to lend money to the company in proportion to their several shares. One of them made the loan by giving his note, which the company endorsed and agreed with him to provide for at maturity. They failed to take up the note when it became due, and the promissor paid it within fourteen days after its maturity.

Held, That there had been no suspension of the commercial paper of the company for fourteen days.

Where stockholders were to advance money to the company in proportion to their interests, and did so advance it for some months, and all but one of them afterwards extended their loans for one year, in accordance with what the treasurer testified was an understanding at the time the loans were made, and the company paid all its trade debts as they matured, and were in good credit, whether the company could be properly considered insolvent, *quere*.

At a meeting of the stockholders, who were also the principal creditors of the company, it was voted unanimously to give a mortgage to one of the stockholders for the excess of his previous advances above his proportion. The petitioner, who was a stockholder and creditor, was present and made no objection.

Held, He was estopped to set up the mortgage as an act of bankruptcy by the corporation.

In re MASSACHUSETTS BRICK COMPANY.

The Massachusetts Brick Company was incorporated in May, eighteen hundred and sixty-nine, for the purpose of manufacturing bricks in Somerville and Medford, with a right to have a capital stock not exceeding five hundred thousand dollars, of which three hundred thousand dollars might be in real estate. The evidence tended to show that the capital stock had been fixed at four hundred thousand dollars, of which about three hundred and fifty thousand had been paid in, and that in July, eighteen hundred and seventy, it was found that so much of this had been invested in land and machinery that the operations of the company were embarrassed for the want of active capital. Thereupon, certain of the shareholders, of whom the petitioner was one, signed this agreement: "The undersigned, stockholders in the Massachusetts Brick Company, hereby agree to furnish the treasurer, in proportion to the amount of stock held by them, whatever money may be required to pay the present indebtedness, at ten per cent. interest per annum, provided

that not over seventy-five dollars per share shall be required on the amount subscribed, to raise one hundred and fifty thousand dollars in full."

The petitioner accordingly lent the treasurer of the corporation five thousand dollars, and took the note of the company at five months, as did others. Some of the stockholders lent their notes on four months, and took a receipt from the treasurer that the company was to pay them at maturity.

When the note held by the petitioner came due in December, eighteen hundred and seventy, he agreed to extend the loan and lent the treasurer his note at four months, taking from him a receipt that the company were to provide payment for it at maturity, it being given for their accommodation. The petitioner offered evidence tending to show that he informed the treasurer that he should not renew the loan again, but should expect the company to pay the note at maturity, which would be the fourth of April, eighteen hundred and seventy-one.

The stockholders advanced different sums, not regulated precisely by the number of their shares, and Oliver Ames, the largest holder, advanced ninety thousand dollars, which was thirty thousand dollars more than his proportion.

The treasurer testified that there was an understanding among the contributors, that the money should not be called for until the company should be able to pay it, and that they should all share alike.

Early in eighteen hundred and seventy-one, at an adjournment of the annual meeting of the stockholders of the company, at which the petitioner was present, Mr. Ames presented a proposition: that if a mortgage were given him for the excess which he had advanced above his share, he would "carry" sixty thousand dollars for one year, if the other stockholders would do likewise. This proposition was accepted unanimously.

All the stockholders, excepting the petitioner, afterwards signed an agreement to extend their several debts, but he

refused to sign it. When his note became due, it was not paid by the company nor were funds furnished him by them, and he took it up within fourteen days after its maturity. He has sued the company at law, and in this petition sets up the non-payment of this note, and the mortgage to Ames as acts of bankruptcy.

The treasurer testified that the company owed very few debts, excepting to its shareholders, and met all its ordinary obligations promptly, and was in good credit; that it could pay this debt, but considered that the petitioner was bound to wait.

E. AVERY for the petitioners; D. W. GOOCH for the respondents.

LOWELL, J.—This case has all the appearance of an attempt to coerce the payment of a disputed debt, by an attack on the commercial standing of a trading corporation. Nevertheless, if that corporation has suspended payment of its commercial paper and there is no real dispute of its validity, or if it is bankrupt for any other reason, the powers of the court are rightly invoked. I am of opinion that there is no commercial paper of the company overdue. The debt to the petitioner is for money paid to take up his own note which he had lent to the company; that debt does not depend upon the company's endorsement of the note, but upon the fact that money has been paid in their behalf. If there had been no endorsement, the right of action would be the same in fact and in form. When the petitioner took up his own note, it was paid, and he neither need to, nor can declare upon it, as still outstanding. He lent it to the company for the very purpose of having it discounted as his note, and not as theirs, and his obligation was always that of a promissor and intended to be so, and their obligation to the holder was merely that of an endorser; their obligation to this petitioner was truly represented by the receipt which agreed to save him harmless, and as soon as he was damnified, he had a good cause of action for money paid, but not upon a promis-

sory note, and as the note was taken up within fourteen days after it was due, there never was any suspension for that period.

A much more difficult question is, whether in March, eighteen hundred and seventy-one, when the mortgage to Ames was given, the company were insolvent and intended the mortgage to be a preference. There is, undoubtedly, much evidence that they needed money to carry on their business, and if we leave out of view the fact that the great body of their creditors were their own stockholders, and hold the debts to them to be ordinary trade debts, there is, certainly, much ground to say that they were insolvent. The petitioner maintains that these are ordinary debts, but it is quite apparent that the whole object and purpose of these loans was to enable the company to carry on its business, and that it would frustrate this purpose to require them to be repaid on demand or even in four months, and, therefore, it may be presumed that most of the lenders had not the slightest intention of treating their loans in that way. I do not mean to say that they had not a legal right to demand re-payment, but they had no intention of pressing their demands at the risk of the insolvency of the company, which was precisely what, in effect, they were seeking to avoid. When, therefore, all, excepting the petitioner, agreed to extend their loans for one year, the question of insolvency was perhaps adjourned for that time. This was the way it struck me at the hearing, as I then intimated. Here was a company in good credit, meeting all its trade debts, but having what the treasurer swears to have been, and the other members, excepting the petitioner, appear to have considered a sort of permanent loan. I fear it might be straining a point to say that this company was insolvent, so that whatever payments it made, or security it gave, must be taken to be acts of bankruptcy if attacked within four months. It is the result, undoubtedly, when traders are wholly insolvent and generally known to be so, that all dealings with them, excepting for present consid-

erations, are liable to be avoided, if they are objected to within the prescribed time.

But another ground exists in this case for saying that the petitioner cannot rely on this act of bankruptcy. The corporation, at a meeting at which he was present, voted to give this security, and he did not dissent, and indeed, so far as appears; assented. It has been held that the vote cannot affect the private rights of stockholders, in their dealings with the corporation, if they were not present and did not assent, and had no notice of the vote until it was too late to affect action under it, though the meeting was a "legal" meeting. *American Bank* v. *Baker*, 4 Met. 164.

But here the petitioner was present and did assent or did not dissent, and had full notice of the vote. It may be said, that it would be useless for him to dissent, when he found that a majority was in favor of giving the mortgage, but I think, if he understood that the corporation was about to commit an act of bankruptcy, as he says it was, it was his duty to protest and see if the stockholders deliberately intended to put themselves in that position. He is proceeding against the corporation for an act which he helped them to commit, and this is a breach of faith towards his fellow stockholders. There can be no clearer, or more decisive, act of bankruptcy than for a trader to assign all his property to trustees for the benefit of his creditors. Such an act is not even capable of explanation, because, however honest it may be, it is a technical fraud on the statute. But it has been uniformly held that a creditor who assents by word or act, or even by silences at a meeting of creditors, is estopped to set up the deed as an act of bankruptcy. *Hicks* v. *Burfitt*, 4 Camp. 435, n.; *ex parte* Kilner, Buck, 105, and the decisions of Lord Eldon, cited in that case in the argument; *Bamford* v. *Baron*, 2 T. R. 594, n.; *ex parte Cawkwell*, 19 Ves. 233; *Buck* v. *Gooch*, 1 Holt. 13.

Two of these decisions go to the mere silence of a creditor. Indeed, in one of them the creditor advised against the course of action adopted. Applying them to this case, it

would seem that the petitioner's failure to protest, at a time and place where he, as a creditor, had a right to be heard, would bind him and this whichever way he voted on the question. My doubt was whether, at a meeting of stockholders, not called as a meeting of creditors, it might be presumed that anything but the affairs of the corporation were to be regarded, and whether a creditor, who happened to be a stockholder, ought to be expected to interfere. But upon reflection, I find it impossible to divide the rights and interests of the parties in this way, for every meeting of stockholders was, in fact, a meeting of the chief creditors, and besides, it rather strengthens the argument for an estoppel that the creditor was not only suffering the debtor to commit an act of bankruptcy, but himself held such relations to the debtor that he was bound to notify him of the consequences of his proceedings.

The evidence tends to show not merely a constructive breach of good faith, but an actual one. The petitioner left Boston before the mortgage was delivered, and left written instructions that the defendants should be made bankrupts and the mortgage be broken up if his note was not provided for at maturity. And on the other hand, there is no evidence that any other party interested, had any thought of bankruptcy, or understood that an act of bankruptcy was about to be committed. The consent of creditors that was asked for and obtained was not to the mortgage but to the extension, that is, Ames would extend his proportion if the others would extend theirs. As to the mortgage, no one is estopped if this petitioner is not, because all that any of them formally and in writing agreed to, was the extension. I think, upon the whole, it was the duty of the petitioner to warn the corporation that they were committing an act of bankruptcy of which he or some other creditor might take advantage, and as he has not done so, he is estopped to set up the mortgage as such an act. Petition dismissed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

Where a debtor's liabilities exceed his assets, and he has ceased to meet his indebtedness as it falls due, a pledge, payment, transfer, assignment or conveyance of any part of his property, absolutely or conditionally, made while in this condition, is an act of bankruptcy, and constitutes sufficient ground, under the twenty-ninth section of the bankrupt act, for refusing him a discharge.

A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, hence, any amount on deposit, in the name of the bankrupt, must go in as assets, and the banker must prove his debt and take his dividends with the other creditors.

When a banker, in accordance with his usual custom, charges his depositor, in his deposit account, for the notes or other obligations as they fall due, the transaction is valid only as between the banker and the depositor, but in the event of the depositor becoming bankrupt, it might constitute an unlawful preference under said act.

In re S. P. WARNER et al.

LONGYEAR, J.—As I deem the second and third specifications sustained by the proofs, and sufficient to defeat a discharge under the bankrupt act, the other specifications will not be considered.

The second and third specifications charge the bankrupts with having given fraudulent preferences contrary to the provisions of the act, and also charge the same acts to have been done by the bankrupts in contemplation of becoming bankrupt and for the purpose of preventing their property from being distributed under the provisions of the act, and of defeating and delaying the operation thereof.

Section twenty-nine of the act, provides that no discharge shall be granted, or if granted be valid, if the bankrupt has, among other things:

FIRST. "Given any fraudulent preference contrary to this act," or,

SECOND. "In contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under any liability for him, or for the purpose of preventing the

property from coming into the hands of the assignee, or being distributed under this act in satisfaction of his debts."

The first provision above cited is general in its terms, and under it it is sufficient to show a preference, which was fraudulent under any of the provisions of the act. The second provision is specific, and it is necessary that the proofs should bring the case clearly within its terms, and show especially that the act charged was done "in contemplation of becoming bankrupt." *In re* Rosenfeld, 1 N. B. R. 161; 2 N. B. R. 49; *in re* Locke 2 N. B. R. 123; *in re* Burgess, 3 N. B. R. 47; *in re* Gay, 2 N. B. R. 114; *in re* Lewis, 2 N. B. R. 145; *in re* Foster, 2 N. B. R. 81.

Where, however, as in this case, the specifications bring the case within both provisions, proof sustaining either is sufficient.

What constitutes a fraudulent preference within the meaning of the first provision of section twenty-nine, above cited, is defined in the first clause of section thirty-five, and it is composed of the following elements: First, actual insolvency of the debtor, or, in lieu thereof, contemplation of insolvency, and, second, that the act complained of was done with a view to give a preference. It is within this provision that I think this case is brought by the proofs.

The specific acts charged and proved are:

FIRST. Payment to Thomas Hughes, a creditor, a debt of twenty-six dollars and fifty cents, July twenty-first, eighteen hundred and sixty-eight, and,

SECOND. Payment to David Preston & Co., creditors, on indebtedness, one hundred and nine-three dollars and fifty cents, July fifteenth, eighteen hundred and sixty-eight.

Under the rule above laid down, the following questions arise:

FIRST. Were the bankrupts insolvent when these respective payments were made?

SECOND. Were these payments, or was either of them, made with a view to give a preference?

In answer to the first question, is sufficient to state that

it is not contested, neither can it be doubted under the proofs, that the bankrupts were in fact insolvent at the times mentioned. But an affirmative answer to the second question is contested. It is claimed, first, that the bankrupts, although in fact insolvent, did not know of their insolvency at the time the payments were made, and that it is therefore impossible that the payments were made with a view to give a preference. The conclusion is no doubt a correct one, from the fact assumed or claimed to exist, but the proofs do not sustain the assumption.

It has been held, and no doubt correctly, that every person is presumed to know his own pecuniary condition. That presumption, however, may be rebutted, and a person may show that he was innocently mistaken as to his true condition. The burden is, however, upon the person setting up such claim. In this case, the claim that the bankrupts were ignorant of their true condition is founded upon some proof in the case tending to show that when they commenced business, which was in February, eighteen hundred and sixty-eight, by a mistake in footing up their assets they appeared then to be amply solvent.

Some time, however, in July, eighteen hundred and sixty-eight, but at what particular day does not clearly appear, but somewhere about the twelfth or fifteenth, the bankrupts took an inventory of their assets, and then learned, and it is not controverted that they then knew, whatever may have been their belief before, that they were insolvent.

It also appears from the proofs that they ceased to meet their engagements as they fell due in the ordinary course of the business in which they were engaged in the latter part of June. This being of itself evidence of insolvency under the bankrupt act, was sufficient at least to put them on inquiry as to their true condition, and to warn them to suspend all payments until they could ascertain whether they could safely pay any of their creditors without jeopardizing the interests of the others. Resort to this fact is, however, unnecessary, because I consider it clearly proven that both

the payments were made after the inventory in July, from which, as we have seen, the bankrupts ascertained a clear knowledge of their insolvent condition.

According to the entries in the bankrupts' cash account, the payment to Hughes was made July twenty-first, eighteen hundred and sixty-eight, which date is, beyond all question, after the taking of the inventory, and which, in the absence of all explanation, must be taken to be the correct date. True, Russell C. Warner, one of the bankrupts, testifies that he thinks nothing was paid Hughes after the inventory was taken. Such mere loose opinion can of course be given no weight as against the deliberate entry upon their books, evidently made at the time the transaction took place.

The payment to Preston & Co. was unquestionably made July fifteenth, eighteen hundred and sixty-eight. Looking at this date alone, and in consideration of the uncertainty as to the exact date of the taking of the inventory, there might be room for doubt as to which took place first. But Russell C. Warner, who gave the check to Preston & Co., testifies that he gave the check while S. P. Warner was in New York, and that the latter did not leave for New York until after the inventory had been taken. This renders it clear, beyond all controversy, that the payment to Preston & Co. was made after the taking of the inventory, and of course when the bankrupt had full knowledge of their insolvency.

But is further claimed, that although the bankrupts were in fact insolvent, and were cognizant of the fact when the payments were made, the proof shows that at those times they were intending to go on with their business, and hoped and expected eventually to pay all their creditors in full, and that therefore they could not have made the payments with a view to give a preference. In other words, it is claimed that these bankrupts, notwithstanding the fact, well known to them, that they were insolvent and had not sufficient assets to pay all their debts in full, decided to take the administration of their estate into their own hands, instead of placing it in the bankruptcy court, (where the law, in its

spirit and intent, if not by its letter, contemplates it should be placed under such circumstances,) with the hope that their creditors would suffer them to carry out such decision, but without any arrangement, consent or understanding with such creditors, upon which to found such hope. Therefore, any payments which the bankrupts made in carrying out such decision cannot be held to have been made with a view to give a preference, because in such case the payment was made with the intent eventually to pay all in full.

I cannot subscribe to any such doctrine. When a debtor's liabilities exceed his assets, and he has ceased to meet his indebtedness as it falls due, and has thus become in law, as well as in fact, insolvent, then every payment made by him is in fact a preference of the creditor so paid over his other creditors; and when such debtor, with a full knowledge of his bankrupt condition, deliberately decides to administer his estate himself, and proceeds to make partial payments, he must be held to have decided and intended to do just what he does do, viz.: to prefer and to pay off such creditors first as to him shall seem fit. Such a decision is, in a general sense, nothing more and nothing less than what a decision of such debtor to pay a particular debt is in a particular sense; and the one is as much in violation of the bankrupt law as the other.

Neither is the case of the bankrupts aided by the claim that is set up for them—that they hoped eventually to be able to pay all their creditors in full; because, in the first place, such hope necessarily involves the idea that the debtor has a right to pay when he pleases, and to prefer whom he pleases, which is in direct violation of the well recognized principle of law that a creditor's right to receive his pay when due is just as great as his right to receive his pay at all; and in the second place, in the condition in which these bankrupts appear to have been, no such hope could have been reasonably entertained. There was no foundation for it in fact. This really appears to have been the conclusion of the bankrupts themselves, because in about a month after they

ascertained their real condition, we find them, without any new developements in their affairs, voluntarily going into bankruptcy, thereby doing just what they should have done in the first instance.

Therefore, the bankrupts being in fact insolvent when the payments were made, such payments operated necessarily as a preference to those creditors to whom they were made, and such payments having been made with full knowledge on the part of the bankrupts of their true condition, they must be presumed, as fair minded, reasonable business men, to have known that such was the operation of such payments, and of course that they made the same with that view. The proof not being sufficient to do away with such presumption, the same remains in full force. I therefore hold that the second and third specifications are sustained.

The sooner it comes to be generally understood that the only safe, lawful and strictly honest course for insolvent debtors to pursue, is at once, upon their condition becoming apparent to themselves, to place their assets in the control of their creditors, where all may share alike, by availing themselves of the provisions of the bankrupt act, the better it will be for both the debtor and the creditor classes.

There is one other position taken by the learned counsellor for the bankrupts which should not be passed by without notice.

David Preston & Co., to whom the payment of one hundred and ninety-three dollars and fifty cents was made, were bankers, and with whom the bankrupts kept their deposits. Preston & Co. held the bankrupts' note for about seven hundred dollars, and the one hundred and ninety-three dollars and fifty cents was the amount which the bankrupts had on deposit with them, and the check which was given to Preston & Co. was for that amount to apply on the note. It was claimed that Preston & Co. had the right to apply the amount of deposits on their note even without any check or other direction of the bankrupts, and that, therefore, the application of it was no preference.

In the first place, I do not consider the position a sound one in law, especially as between the banker and the other creditors of the bankrupt depositor. The banker has no lien upon the moneys of depositors for any separate debt which the depositor may be owing him, and he therefore has no right to apply the same to the payment of such debt without the consent of the depositor. Were it otherwise the bankrupts' estate might be all in money thus on deposit, and the banker might hold indebtedness against him sufficient to absorb the whole, and the other creditors be thus left without anything whatever, thus effectually defeating the object and purpose of the bankrupt law. The amount on deposit must go in as assets, and the banker must prove his debt and take his dividends with the other creditors.

Where, however, it is according to the usual and generally understood custom of a banker to charge to his depositors in their deposit account the notes or other obligations of the depositors as they fall due, the consent of the depositor to such course may fairly be presumed, and the transaction be thus brought within the rule as above stated. But even this would make the transaction valid only as between the banker and the depositor, but as between them on the one hand, and the other creditors on the other hand, it might constitute an unlawful preference under the bankrupt law, and for that reason be void.

But in any view of the law the position assumed cannot be maintained in this case, because the note held by Preston & Co., according to the statement of it as given by the bankrupts in the schedule of their indebtedness attached to their petition for adjudication of bankruptcy, was not due at the time the check was given. The check was given July fifteenth, and the note was not due till the sixth day of August following. Preston & Co., therefore, had no demand against the bankrupts at the time the payment was made, and the payment stands out, in one sense, as a mere gratuity, and clearly as a preference carrying with it evidence that it was so intended.

The second and third specifications being sustained, a discharge is refused.

MR. REILLY for opposing creditors. MR. KENT for bankrupts.—November 8, 1871.

UNITED STATES DISTRICT COURT—W. D. TENNESSEE.

A transfer which is only the execution of a contract made when there was no circumstance to impeach it as an intended fraud on the bankrupt law, and when the parties were acting in good faith and long before anything occurred to throw a suspicion over the solvency of the debtor, will be protected, and a bill brought by the assignee in bankruptcy to recover personal property conveyed under the above state of facts will be dismissed.

In re J. P. WOOD.

In December, eighteen hundred and sixty-nine, within six, but more than four months prior to the filing of the petition in this case, James P. Wood, the bankrupt, proposed to one Willingham, to whom he owed a note for five thousand dollars, to convey to him certain land in payment of the debt, which proposition Willingham declined. Wood then told him that he could very easily sell the land and would do so to pay that debt if Willingham would take the purchase notes, to be secured by lien on the land in payment, to which Willingham agreed, but not in writing. Wood did afterwards sell the land and took notes for the purchase money for about the amount of the Willingham debt. Before they were delivered, Howell, Wood & Co., an extensive mercantile firm at Memphis, became bankrupt, and it was generally rumored that J. P. Wood was, by their failure, rendered insolvent by reason of his liabilities for that firm, but there was no proof that Willingham knew or had cause to know of these rumors about James P. Wood. He had before that come to Brownsville by appointment, to settle with Wood and take the purchase notes, but owing to sickness of one of the parties the settlement was not made. A few days after the failure of Howell, Wood & Co., James P. Wood and Willingham did

settle by the surrender of Wood's note and the transfer to Willingham of the purchase notes for the land, and within four months afterwards James P. Wood became bankrupt. It was in proof that James P. Wood was regarded as solvent, and that at the time of the transfer of the notes it was not positively known in the community, when these transactions took place, to what extent he was involved in the failure of Howell, Wood & Co., but it was the general belief that he was very largely so involved.

The assignee filed a bill in the district court to set aside the transfer of the notes to Willingham and to recover them for the estate.

TRIGG, J. held that the transfer was not fraudulent under the bankrupt act in the above state of facts. He held that the transfer was only the execution of a contract made when there was no circumstance to impeach it as an intended fraud on the act, and when it was conceded the parties were acting in good faith, and long before the failure of Howell, Wood & Co. had thrown a suspicion over the solvency of James P. Wood; that it was not necessary that the contract then made should have been in writing, nor was it necessary that the notes should have been transferred to entitle Willingham to them, or to make the contract binding on Wood. In delivering the notes after he became insolvent he was only doing what he was bound by his previous agreement to do, and in the absence of all actual or intentional fraud in such delivery, it was the completion of a contract valid in itself and made in good faith before the insolvency, and the bill was dismissed, the assignee taking an appeal.

SMITH & JEFFERSON for assignee. ESTES & JACKSON for Willingham.

UNITED STATES DISTRICT COURT—N. D. NEW YORK.

A specification filed in opposition to a bankrupt's discharge will not be stricken out because all the transactions therein alleged as the grounds of opposition occurred long before the passage of the bankrupt act.

There is nothing in the language of the twenty-ninth section of said act, which indicates an intention to confine the operations of its provisions to transactions occurring *after* the passage of the act. *In re* Rosenfeld, 1 N. B. R. 161, considered and overruled.

In re J. CRETIEW.

HALL, J.—This is a motion to strike out the second and third specifications filed by a creditor in opposition to the bankrupt's discharge.

The first specification sets forth, among other things, that in eighteen hundred and sixty-nine, the opposing creditor recovered a judgment in the supreme court of this state for seven thousand four hundred and seventy-five dollars and upwards, upon an administration bond which the bankrupt had before then signed as surety.

This first specification is referred to in the second specification, which sets forth in substance, (among other things,) that the bankrupt, after he had executed such administration bond in the penalty of twelve thousand dollars, and had become liable to pay a large amount by reason thereof, well knowing his liability, and being insolvent and in contemplation of becoming bankrupt, and the owner at the time of two certain described stores and premises in the city of Buffalo, of about the value of eighteen thousand dollars, and having previously thereto executed a mortgage on said stores and premises for the sum of three thousand dollars to one John Hutchinson, he, (the said bankrupt) on or about the nineteenth day of October, eighteen hundred and sixty-four, did cause the mortgage to be assigned and passed to one James M. Baker, and had the said Baker thereafter commence an action thereon to foreclose such mortgage and have said property sold by virtue of a judgment on said mortgage; that said property was so sold December tenth, eighteen hundred

and sixty-four, for two thousand nine hundred dollars, and the title thereto taken by Joseph Borke, a son-in-law of the bankrupt; that the bankrupt, in contemplation of becoming bankrupt and being insolvent, had the title to said property taken and held by Borke; that said mortgage was made and executed, and said foreclosure instituted and judgment and sale thereunder had, and the title to said property taken in the name of said Borke and held by him as a fraudulent gift, transfer and conveyance, and for the purpose of preventing the same from going into the hands of an assignee and being equally distributed among all of the bankrupt's creditors, and merely as a cover and to prevent such property from being taken on account of any liability of said bankrupt on said administration bond, and with the intent to enable the bankrupt to retain, as he has ever since done, the control and management of said property; that he now occupies one of the said stores and lives in or over one of them; that the bankrupt, during all the time aforesaid, was insolvent and in contemplation of becoming bankrupt, and that the said sale or pretended sale of such property was fraudulent and void. It does not allege any concealment of his property or any willful false swearing by the bankrupt.

The third specification alleges that the bankrupt's assets are not equal to fifty per cent. of the claims proved against his estate, upon which he was liable as principal debtor, and which debts were contracted subsequent to December, eighteen hundred and sixty-eight; but it does not allege that the consent of a majority in number and value of his creditors holding his said last mentioned debts was not filed before or at the hearing upon the order to show cause against his discharge. It is therefore insufficient, and must be stricken out. But this question may be presented by the opposing creditor, or any other creditor, upon the hearing before the register on the reference, under rule sixty, of the general question whether the bankrupt is entitled to his discharge.

It is insisted that the second specification should be

stricken out because all the transactions therein alleged as the grounds of opposition to the bankrupt's discharge occurred long before the passage of the bankrupt act.

By the twenty-ninth section of that act it is provided that "no discharge shall be granted to the bankrupt if he has given any fraudulent preference contrary to the provisions of that act, or made any fraudulent payment, *gift, transfer, conveyance* or assignment of any part of his property; * * * or if he has, in contemplation of becoming bankrupt, made any pledge, payment, *transfer, assignment* or conveyance of any part of his property, *directly or indirectly,* absolutely or conditionally, * * * *for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under the act in satisfaction of his debts;*" and the question is whether the second specification sufficiently alleges any bar to the bankrupt's discharge under these provisions.

There is nothing in the language of the section which contains these provisions which clearly expresses or plainly indicates an intention to confine the operation of these provisions to transactions occurring after the passage of the bankrupt act. In respect to other fraudulent or prohibited acts mentioned in the same section, such intention is clearly expressed, or necessarily to be inferred, but such is not the case in respect to the provisions under consideration, and clear or strong proof of legislative intention should be required before deciding that Congress intended that an act equally fraudulent and dishonest in its character and purpose before and after the passage of the bankrupt act should bar a discharge if done the day after its passage, and not bar it if done the day before it became a law.

In order to present in the clearest and fullest manner the language upon which this question of interpretation or construction arises, the twenty-ninth section of the bankrupt act will be copied in full. It is as follows:

SEC. 29. *And be it further enacted,* That at any time after

the expiration of six months from the adjudication of bankruptcy, or if no debts have been proven against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts; and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and *by publication* at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt.

No discharge shall be granted, or, if granted, be valid—

(1) If the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or (2) if he has concealed any part of his estate or effects, or any books or writings relating thereto; or (3) if he has been guilty of any fraud or negligence in the care, custody or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act; or (4) if he has caused, permitted or suffered any loss, waste or destruction thereof; or (5) if, within four months before the commencement of such proceedings, he has procured his lands, goods, money or chattels to be attached, sequestered, or seized on execution; or (6) if, since the passage of this act, he has destroyed, mutilated, altered or falsified any of his books, documents, papers, writings or securities; or (7) has made or been privy to the making of any false or fraudulent entry in any book of account or other document with intent to defraud his creditors; or (8) has removed, or caused to be removed, any part of his property from the district with

intent to defraud his creditors; or (9) if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property; or (10) has lost any part thereof in gaming; or (11) has admitted a false or fictitious debt against his estate; or (12) if having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or (13) if being a merchant or tradesman, he has not, *subsequently to the passage of this act*, kept proper books of account; or (14) if he, or any person in his behalf, has procured the assent of any creditor to the discharge; (15) influenced the action of any creditor at any stage of the procedings by any pecuniary consideration or obligation; or (16) if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee; or (17) of being distributed under this act in satisfaction of his debts; or (18) if he has been convicted of any misdemeanor under this act; or (19) has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

In regard to the first four of the numbered clauses of this section it may be conceded that the character of the acts therein described requires that they should have been committed after the passage of the bankrupt act. In the fifth clause there is an express limitation of time which only requires that the acts therein described should have been

committed within four months before the commencement of the proceedings in bankruptcy, and as a petition could have been filed at the end of three months after the passage of the act, it can hardly be said that the acts referred to in this clause must have been committed after the passage of the bankruptcy act in order to bring the bankrupt within the prohibition of this section.

The next clause, by its express terms, is limited to acts committed since the passage of the act, and as the succeeding clauses (the seventh and eighth) are only connected with it by the disjunctive conjunction *or*, the same may be said in regard to those clauses. This actual and distinct expression of a limitation, in the clauses first alluded to, to acts committed after the passing of the act would seem to evidence an intention on the part of the legislature that the clauses in which there was no such limitation, either expressed or necessarily to be inferred, should not be so limited.

In the next or ninth clause, there is a change of phraseology, which was not necessary unless it was intended to disconnect its provisions from the limitation of time contained in the three next preceding clauses. If not so intended, the connection with the sixth seventh and eighth clauses would have been made by the use of the word *or* alone, as in the seven and eighth clauses, but the words "*if he*" are inserted, apparently *ex industria*, to so far disconnect this clause from those immediately preceding as to remove it from the limitation of time expressed in the sixth clause.

The subsequent insertion in the thirteenth clause, which contains the provision in regard to the omission to keep proper books of account of the words "*subsequently to the passage of this act*," is also a significant indication that the legislature intended no such or similar limitation to the clauses where no limitation was expressed or necesssrily to be implied from the nature or character of the acts described; and in the clauses numbered fourteen and sixteen, the words "*if he*" are inserted as indicating a partial but distinct separation of these clauses from the preceding one (as was done

in the commencement of the sixth clause,) so as to disconnect them from any limitation of time contained in the preceding clauses. I shall therefore hold that there is no such limitation in respect to the acts relied upon in said second specification. It was strongly urged that the intents imputed to the bankrupt by this second specification could not possibly have existed so long prior to the passage of the bankrupt act.

This is deemed a question of fact and not one of law, and the court cannot say that the intents alleged, and which must be proved to invalidate the discharge, could not have existed prior to the passage of the bankrupt act as alleged, more especially as it appears by the Congressional Globe, that on the twelfth day of December, eighteen hundred and sixty-four, a bill to establish a uniform system of bankruptcy throughout the United States, which had been postponed from the then last session, was taken up on motion of Mr. Jenckes, was on his motion amended by striking out the words "first September, eighteen hundred and sixty-four," as the time when the act should take effect and inserting in lieu thereof "first of June, eighteen hundred and sixty-five," and was then passed by the house; that it was the next day sent to the senate for concurrence, when it was immediately read twice and referred to the committee on the judiciary. Indeed, from May twenty-third, eighteen hundred and sixty-two, when a bankrupt act was introduced into the senate of the United States by Mr. Foster, of Connecticut, to the passage of the bankrupt act of eighteen hundred and sixty-seven, the contemplation of becoming bankrupt may not unfrequently have been the happy or unhappy condition and occupation of the minds of many hopeless insolvents, and some of them, even in eighteen hundred and sixty-two, may have hastened to make secret and fraudulent dispositions of their property to prevent its distribution in bankruptcy and secure it for the future use of themselves and their families. Contemplation of bankruptcy within the intent of the bankrupt act, includes not only the contemplation of proceedings to be carried on in the bankruptcy court under the eleventh

or thirty-ninth sections of that act, but also the contemplation of the commission of such acts as are by the bankrupt act declared to be sufficient to authorize an adjudication of bankruptcy against the party by whom they have been committed. *In re* Freeman, 4 N. B. R. 17. And an intent to prevent the distribution of his property under the bankrupt act might well exist in a case where a fraudulent disposition of a debtor's property was made in anticipation of the expected early passage of a bankrupt act.

Taken in connection with such of the allegations of the first specification as it refers to and substantially adopts, and considering the allegations of fraud, and as to the continued use and possession by the bankrupt of the store and premises described, (*in re* Moore, 2 Bt. Rep. 325,) I am of the opinion the second specification is sufficient, and the motion to strike it out is accordingly denied.

I am aware that *in re* Rosenfeld, 1 N. B. R. 161, it was held that such fraudulent acts must have been committed after the passage of the bankrupt act in order to bar a discharge. It is with much regret that I feel constrained to adopt a construction of the provisions in question, adverse to that adopted by the learned and excellent judge, now deceased, who decided that case, but I cannot approve his reasoning or adopt his conclusions, so far as they affect the principle questions in this case. I cannot agree that the acts enumerated in section twenty-nine "are in the nature of offences *created* and defined by the bankrupt law, the penalty for the commission of which, by the bankrupt, is *the forfeiture* of his *right* to a discharge," or that to hold "that acts committed before its passage were *offences* against the bankrupt law, would be to make that law, if not an *ex post facto* law, in the strict sense of the term, yet at least a law retroactive or retrospective in its character," if he meant that the bankruptcy courts, by the mere withholding of a discharge by reason of these provisions, necessarily constituted or considered these acts such *offences* against the bankrupt law.

The bankrupt act was intended to operate, and has uniformly been held to operate upon and provide for the discharge of debts created before as well as after its passage, and in respect to debts contracted before its passage it is clearly a retrospective and retroactive law so far as it authorizes the discharge of such prior debts.

Prior to the passage of the act the debtor had no *right* to a discharge from such debts, and he now has no right to such discharge except in the cases provided for and upon the conditions prescribed in the act.

The provisions under consideration create no "offence" and there is no *forfeiture* of an existing right denounced as the penalty for a newly created *offence* for the simple and obvious reason that a right to a discharge in the cases provided for did not exist when the act was passed and therefore the provisions now under consideration are not retroactive or retrospective in the offensive or proper sense of those terms. The act gives a debtor a *right* to a discharge of a debt contracted prior to its passage, provided he fully complies with its provisions and is not brought within the limitations, exceptions or prohibitory provisions of the act, and as this right only exists by virtue of the provisions of the bankrupt act, (which provisions, as has been stated, are retroactive and retrospective as to debts contracted before its passage,) the provisions which judge Field considered retroactive or retrospective in their application to acts done before the passage of the act, are not in fact so, but only exceptions in restriction or limitation of the grant of power to the bankruptcy court, under which grant alone a debtor could, in a case not excepted from its operation, assert a right to a discharge. These exceptions and limitation, are, therefore, so far as this case is concerned, in restraint of a *retrospective* and *retroactive law*, and the considerations which require courts not to give such construction to a statute as to make it *retroactive* in its effects should operate in favor of and not against a creditor whose debt, as in this case, accrued before the passage of the bankrupt act, and if it be true, as stated

by the learned judge, that "as a general rule, it is a very objectionable feature in any law," to give it a retrospective operation, and that "an intention on the part of the legislature to give a law such a character, will never be presumed in the absence of express words to that effect," words of exception or limitation which even partially remove such objectionable features should be liberally construed and made effective for that purpose, when it can be done consistently with the language of its provisions.

The learned judge who decided *in re* Rosenfeld, 1 N. B. R. 161, supposed that the words "subsequently to the passage of this act" in the clause which relates to the keeping of proper books of account were inserted because of the difference of meaning between the word "*subsequently*" in that provision and the word "*since*" when used in the same connection in the sixth clause. His acute and discriminating criticism upon the distinguishing difference in the meanings of these words is doubtless accurate and just, but it may well be doubted whether such nice distinctions, and such refined, exact and scholarly criticism should be much relied on in the interpretation or construction of legislative enactments. Webster, whose authority is properly invoked by the learned judge, gives, "after, from the time that," as the primary signification of "since." He also says that the proper signification of *since* is *after*, and its *appropriate* sense includes the whole period between an event and the present time, but after giving citations as examples of its use, he further says: "*Since*, then, denotes during the whole time after an event *or at any particular time* during that period." By lawyers and legislatures most words not technical in their character, are used in their general and popular sense without nice discrimination in respect to their more exact critical meaning, and for this reason the substitution of the word *subsequently* for the word *since* in the second of the phrases above referred to is not considered as effecting in any considerable degree the question of interpretation involved in this case. If such nice and critical discrimination, and such learning, care and

perfect accuracy of expression, as it has been supposed was exercised in this substitution of *subsequently* for *since*, had been exercised in the selection and use of the precise words and exact forms of the sentences necessary to express the legislative intention in the fullest, clearest and most perfect manner throughout the whole of this act, it would have reduced the labors of the profession and of the courts, greatly to the advantage of both debtors and creditors.

W. L. JONES, for opposing creditor. GEORGE GORHAM for bankrupts.—September 30, 1871.

UNITED STATES DISTRICT COURT—NEW JERSEY.

Creditors petitioned to have debtors adjudged bankrupts. The debt due the creditors had been merged in a judgment which was clearly a fraudulent preference.

Held, That the debt having been thus merged it was not a provable debt, and a petition founded upon it could not be sustained.

In such a case, however, creditors will be allowed to surrender their preference, and upon their doing so, the acts of bankruptcy being confessed, an adjudication will be ordered.

In re M. HUNT and W. E. HORNELL.

NIXON, J.—Objections are made to an adjudication of bankruptcy in this case, because the petitioning creditor's debt is not one provable in bankruptcy.

The petition alleges that the nature of the creditor's demand against the alleged bankrupts is, first, a promissory note dated February eighth, eighteen hundred and seventy-one, for one hundred and ninety-one dollars and ninety-seven cents, payable two months after date, and a book account for goods, wares and merchandise, sold and delivered by the petitioning creditors to the debtors, amounting in the aggregate to four hundred and seventeen dollars and five cents: and that the acts of bankruptcy committed are (1,) a general assignment of their property under the state law, and (2,) the

non-payment of commercial paper more than fourteen days after its maturity.

The acts of bankruptcy are admitted, but the adjudication is resisted upon the ground that the debt of the petitioning creditors has been merged in a judgment; that a suit has been brought upon the said debt in the state court and a judgment obtained thereon against the debtors; that said judgment is still outstanding and a lien upon their property, and that the same was obtained by the creditors after they had reasonable cause to believe the debtors to be insolvent, and hence is a fraud upon the provisions of the bankrupt act.

This is an involuntary proceeding, and one of the facts necessary to exist in order that the court may have jurisdiction is that the petitioning creditor shall have a debt against the alleged bankrupt *provable* under this act amounting at least to two hundred and fifty dollars.

As this case is now presented to the court, the petitioning creditors have not a debt of this character. With a full knowledge that their debtors had committed an act of bankruptcy by allowing their commercial paper to go to protest, and not paying it within a period of fourteen days, and thus having reasonable cause to believe them to be insolvent, instead of taking their debtors into the court of bankruptcy, that their property might be administered and equally distributed according to the beneficient aims of the bankrupt act, they hurried into the state courts and obtained a judgment upon their claim hoping, in a race of diligence, to outstrip and obtain a preference over other creditors, contrary to and in fraud of its provisions. Finding that they were foiled in their endeavor to acquire a lien upon their debtors' property by the conveyance of all their estate to an assignee, for the benefit of their creditors, under the state law the petitioning creditors then filed their petition in bankruptcy in this court, against their debtors, alleging their debt to consist of the promissory note and book ac-

count, which had already been merged in the judgment then and now subsisting and outstanding against their debtors.

The evidence of debt which the petitioning creditors have against the alleged bankrupts, is not the promissory note and book accounts, but the judgment in which they have merged, and the judgment obtained under these circumstances is clearly not a debt provable under the act, but is void as a fraudulent preference.

The petitioning creditors having placed themselves in this dilemma, is there no remedy for them? The answer to this question will be found in a lawful consideration of the provisions of the twenty-third and thirty-ninth sections of the act. By the twenty-third section it is provided that, "any person who, after the approval of this act, shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom, until he shall first have surrendered to the assignee all property, money, benefit or advantage received by him under such preference."

In the thirty-ninth section it is enacted "that any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, * * * * or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors, or to defeat or delay the operation of this act, * * * * shall be deemed to have committed an act of bankruptcy, * * * * and shall be adjudged a bankrupt, * * * * and if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned or transferred contrary to the act, *provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was

intended, and that the debtor was insolvent; and such creditor shall not be allowed to prove his debt in bankruptcy."

The provisions of these two sections, upon their face so contradictory, must, if possible, be so reconciled that both may stand. The most satisfactory way to do this is to hold that the prohibition of the creditor to prove his debt, in the thirty-ninth section, only applies to those cases where he has refused upon demand to surrender his preference and compelled the assignee by suit, to recover back the money or property so claimed and held by him in fraud of the provisions of the act. He may surrender his preference under either section, and prove his debt before a recovery against him by judgment, but after a recovery he is not permitted to prove under either. *In re* Montgomery, 3 N. B. R. 97; *in re* Davidson, ib. 106.

But this construction of the apparently contradictory provisions of these sections does not quite reach the difficulty in the present case. The surrender provided for is a surrender to the assignee. Can it be made by a petitioning creditor, when he files his petition and before an assignee has been appointed, so as to make his debt provable under the act?

Looking at the spirit of the law and the design of the surrender, I am of the opinion that he can, by setting forth in his petition all the proceedings that have been had to obtain the preference, and by voluntarily surrendering such preference for the general benefit of the creditors of the estate. After the petition has been filed, the creditor himself and all his interest in the alleged bankrupt's property as well, are under the control of the court, and the court is in a position to compel him, at any subsequent stage of the proceedings, to make good his tender, and to surrender to the assignee, before he shall participate in a dividend, and thus the object of the law, to wit, equally in the distribution of the assets, is secured.

In the present case, if the petitioning creditor shall amend his petition, setting forth to the court the judgment obtained

and making a surrender of all preference under or by virtue of it, an order of adjudication will be made upon the acts of bankruptcy alleged and confessed.

If not so amended, the proceedings do not disclose a provable debt under the act, and the petition must be dismissed with costs.—October 17, 1871.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt or security, necessarily knows or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law; but persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as they do not necessarily enable the debtor to contravene the act, or defeat any of its requirements.

DARBY'S TRUSTEES v. *LUCAS.*

TREAT, J.—Under the provisions of the bankrupt act, on a correct exposition of which several cases depend, the ordinary dealings of men are not to be interrupted further than is necessary to secure equality among creditors, and honesty and lawful dealing by and with debtors.

A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt or security, necessarily knows or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law. The fact that the debtor cannot pay all, and then pays some, works in itself the prohibited preference. Under such circumstances the debtor can ordinarily be forced into bankruptcy, and if not forced, it is his duty, unless all his creditors consent to indulge him, to apply for the benefit of the act. As soon as suit is brought by a creditor, if the debtor has no defence, he should apply to the bankrupt court, and thus have his creditors placed on a footing of equality. Hence a preference obtained through the voluntary action of

a debtor, or by his passiveness, is a preference either procured or suffered by him.

But persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as their purchases do not necessarily enable the debtor to contravene the act or defeat any of its requirements. The purchase money may furnish the needed means of extricating the debtor from his embarrassments, especially if he be engaged in a pursuit whereby insolvency is not determinable by the ultimate outcome, but by his ability to meet his liabilities as they mature in the ordinary course of business.

Mr. Darby was a banker, and therefore would have been insolvent whenever his banking liabilities were not promptly met. It seems that they had been met up to the date of this sale of real estate, though by extraordinary shifts in borrowing, and that some of his real estate paper had been past due for some time. But it also seems that he had resorted to street brokers for ten or more years, and that he has had a reputation for wealth, as owning large landed interests. Some of this paper passed through the hands of street brokers into the possession of the savings institution of which the defendant was a director, and the cashier of that institution was the agent of Mr. Darby in negotiating the sales. It seems that the inference is as natural that the officers of the institution, though they may have thought him embarrassed, also deemed his paper good, as it would not have been bought, as that they believed it to be as uncertain or worthless. The sale of reality was not out of the usual course of business within the meaning of the bankrupt act, and therefore it is for the plaintiff to make out his case affirmatively. The fact that paper secured by a deed of trust is permitted to remain past due for a length of time, indicates either a virtual renewal of the loan, or consent given and does not therefore necessarily subject the debtor to the penalties of the act.

Without, however, analyzing the testimony in detail, or

passing formally upon each of the many incidental points of law presented, it must suffice that this court holds that to void the deed it must be satisfactorily proved that the defendant had reasonable cause to believe: first, that Mr. Darby was insolvent or in contemplation of insolvency; and second, that by the transaction Mr. Darby intended to contravene the bankrupt act. Now, if for the sake of argument, it were admitted that defendant knew Darby to be technically insolvent, still the second element would have to be proved, without which the highly penal provisions of sections thirty-five and thirty-nine are not applicable.

As it is clear to the mind of the court that the proof falls far short of making out the second element named, it is unnecessary to inquire particularly into the first.

The court holds that under the second clause of section thirty-five, in a case like that under consideration, the reasonable cause to believe each of the two elementary facts must be satisfactorily proved in order to void the deed.

February 14, 1871.

UNITED STATES DISTRICT COURT—MASSACHUSETTS.

Where a partner retired from a firm, but permitted his name to remain for the benefit of the other partners, he was held liable to persons who bought the note of the new firm in ignorance of the dissolution, and in reliance, in part, on his name.

A notice in the newspaper not read by the person dealing with the new firm, *Held* not to affect him with notice of the dissolution of partnership, though he had not been a customer of the old firm, in a case where the new firm had the right to use the old style in which the name of the retiring partner appeared.

In re KRUEGER et al.

Petition against Krueger, Lond & Bailey, alleged to be partners in trade, under the firm of Krueger, Lond & Co. and to have stopped payment of their commercial paper. Krueger defended on the ground that he had left the firm

before the note held by the petitioners was given. The firm had carried on the lumber business in Boston for about three years, and in September, eighteen hundred and seventy, there was a verbal agreement for a dissolution. Krueger retired and sold out his interest to the remaining partners on a credit of four months, with a condition that the sale should be void if the notes were not paid at maturity. The notes were not paid. He took no further part in the business, which, however, was conducted in the old name of Krueger, Lond & Co. with his consent, and the name remained over their place of business. In December, eighteen hundred and seventy, notice was published three times each in two newspapers of Boston, that Kreuger had retired, and that Lond and Bailey would continue the business at the same place and under the old name. The petitioners were bankers who had often discounted the firm notes and other paper signed or endorsed by them, but never by direct negotiation with the firm or any member thereof, but through a broker or other third person.

This note was given in the name of Krueger, Lond & Co., in February, eighteen hundred and seventy-one, to Badger & Batchelder, in exchange for their note, as had often been done by both the old and new firm. The petitioners had not actual notice of the dissolution, though they always took in at their office one of the newspapers in which the notice was printed. There was conflicting evidence upon the question whether Badger & Batchelder had such notice. They sold the note to the petitioners for value before its maturity.

H. D. HYDE for the petitioners.

C. P. JUDD for the defendant, Krueger.

LOWELL, J.—Three points are clear upon the evidence before me: 1. The firm of Krueger, Lond & Co. was dissolved by the retirement of Krueger in September, and this was published in the newspapers in December. 2. The petitioners had no actual notice, and supposed when they took

the note that it bound Mr. Krueger. 3. The old firm style, which included the name of Krueger, was retained by his former partners with his consent.

The other matter of fact, whether Badger & Batchelder, the payees of the note, had actual notice of the change, was not so fully cleared up as would be desirable and might have been practicable if all the persons connected with the transaction had been examined.

Assuming that the petitioners had never dealt so directly with Krueger, Lond & Co. as to be entitled to actual notice of the dissolution of the partnership, still if they took this note relying in part on the credit of Krueger, and he authorized his late partners to use his name in their business, he is responsible as a partner in respect to this note. One of the reported cases decides that the mere authority to use the former partner's name imports an obligation for all debts, even those held by a person who knew of the arrangement. *Brown* v. *Leonard*, 2 Chitty R. 120. Another case is that the retired partner, if his name is retained in the firm, is liable for injuries caused by the negligence of a driver of a dray belonging to the new firm. *Stables* v. *Eley*, 1 Stark. 614.

These decisions go much beyond anything demanded by this case, but they seem to have received the approval of the text writers. Thus chancellor Kent says, 3 Com., 5th ed. 68, "When a single partner retires from the firm, the same notice is requisite to protect from continued liability; and even if due notice be given, yet if the retiring partner willingly suffers his name to continue in the firm or in the title of the firm over the door of the shop or store, he will be holden." And in 1 Lindley, Partnership, 4, 5, it was said to be wholly immaterial whether the person holding himself out as a partner does or does not share profits or losses; nor even that it is known that he does not share them, because the permission to use his name imports a willingness to be liable for the debts and to look to the real partners for indemnity. And at page 330 of the same volume we find: "If a partner

retires and gives notice of his retirement, and he nevertheless allows his name to be used as if he were still a partner, he will continue to incur liability on the principle of holding out, explained in the earlier part of this treatise."

That one who is not really a partner may be charged as such by third persons who have been led by his acts or declarations to believe him to occupy that relation, is familiar law, and has often been recognized in Massachusetts, where this note was made and negotiated. Story on Partnership, secs. 64, 65; *Fitch* v. *Harrington*, 13 Gray, 468; *Adams Bank* v. *Rice*, 2 Allen, 483, per BIGELOW, C. J.

In *Goddard* v. *Pratt*, 16 Pick. 412, it was held that the members of a copartnership which had been dissolved, but permitted the firm name to be used by an incorporated company, were liable upon contracts made by the corporation in the name of the firm with persons who had no knowledge of the dissolution. That case does not find what notice is necessary in order to exonerate the partners, and it may be argued with some force, that a publication in the newspapers is enough to bind all persons who had not dealt directly with the firm before the notice was published. This is the general rule, but we have seen that the English books and chancellor Kent, in his commentaries, make an exception of a case like the present, and hold that the retiring partner remains liable notwithstanding notice, if his name is still used with his consent.

It may be doubted whether an estoppel ought to apply where the creditor has not in fact been misled, that is to say, where he has actual notice of the true state of the case, but leaving out actual notice, which is negatived by the evidence here, I believe the true rule to be, that one who suffers his name to be used in a firm must answer to all who rely on that name, whether old customers or not. Here is a note signed Krueger, Lond & Co. with the defendant's general authority, as between the parties it means only Lond and Bailey, but when third persons take it in good faith, believing that it binds the three persons who are apparently bound

by it, they ought to be bound unless the party had actual knowledge that the firm name expressed something different from its purport, and this, upon the familiar principle that the retiring partner has enabled his former associates to mislead an innocent third person, and a mere constructive notice does not take a case out of this first rule.

In accordance with this opinion, the defendant, Krueger, will be defaulted.—September, 1871.

UNITED STATES DISTRICT COURT—E. D. MISSOURI.

Where husband and wife join in a deed duly acknowledged so as to release the dower, if the deed be avoided in the hands of a fraudulent grantee as having been executed by the bankrupt with intent to hinder, delay and defraud creditors, the assignee in bankruptcy will be entitled to the land divested of the wife's claim to dower, and the husband's right to a homestead.

To a bill brought by the assignee in bankruptcy, to vest the title of the fraudulent grantee in himself, that the land may be sold clear of encumbrances, the bankrupt and his wife are proper parties if they claim homestead and dower.

COX, assignee, v. *WILDER et al.*

The bill states that Sauer, the bankrupt, made a deed to Wilder to defraud his (Sauer's) creditors, for the nominal consideration of five thousand dollars, but really without any valuable consideration; that after said deed was executed by him and his wife and duly acknowledged, it was lodged in the proper office for record; that thereupon some of Sauer's creditors sued out attachments on the ground that said deed was made to defraud creditors, and then said deed was withdrawn by the defendants from the recorder's office before it had actually been placed on the records; that said deed has since been destroyed or concealed, and that said Sauer and wife pretend that they have respectively a homestead and a dower interest in said premises. The object of the bill is to have said fraudulent deed adjudged void as to creditors, and

the title to the premises vested in the assignee discharged of both dower and homestead interests.

The bill in its general features looks to a conveyance by the grantee (Wilder), under the decree of this court, to the assignee, so that the latter may be vested with all the right, title and interest vested in the grantee.

Demurrers are interposed by the respective defendants. Wilder for multifariousness, and Sauer and wife for want of equity.

WHITTLESEY for plaintiffs. DRYDEN & DRYDEN for defendants.

TREAT, J.—The propositions involved are, admitting, as the demurrers do, that said deed is void as to creditors:

FIRST. Whether the inchoate dower of Sauer's wife is still in her.

SECOND. Whether the homestead interest is still in Sauer.

THIRD. As resulting from the foregoing, whether the assignee in bankruptcy can have vested in him the complete title including both homestead and dower interests.

At the outset the court is met on each of the propositions with conflicting decisions based mainly on very nice and subtle distinctions as to the nature of the interests and questions involved. In their opinions on the dower question, it is held by some courts that, as the wife, having merely inchoate dower, does not convey by grant, but merely by estoppel, and that, as there is thus sufficient interest only in the grantee to feed the estoppel and he takes accordingly. Therefore if the deed be avoided in consequence of the fraudulent acts of the husband, there is left in him no interest whereby the estoppel can be fed, consequently the inchoate dower must remain in her as if no such deed had been executed. Other courts differ, on the ground that as the right was in her to relinquish her inchoate interest in the realty, when she did so, the estate was free from any claim or interest therein that she might otherwise have asserted.

Without reviewing the authorities or commenting in

detail on the reasons given for their conflicting conclusions, the opposing views as generally presented may be thus summed up. The deed is valid between the parties, and only void as to creditors. Now if only void as to creditors, the latter, if the deed be adjudged void as to them, can take no greater interest in the premises than they could have had if the deed were never made; consequently they can take no more than was subject to execution, excluding therefore both homestead and dower interests.

On this view of the case many intrinsic difficulties arise which the learned opinions do not fully discuss. If the deed is valid between the parties, then except as to the right of creditors, every interest passed to the grantee which the grantors could convey, and where the creditors' rights are enforced the question must still remain, as between grantors and grantee, who has the dower and homestead interest which the creditors could not originally reach? How is it, as some courts maintain, that the dower interest, which the wife has relinquished to the grantee, and which she is estopped from disputing passed to him, is still in her? He may have paid a valuable consideration therefor, and still it is said if her husband's conveyance was in fraud of his creditors, yet her inchoate dower which she relinquished for value does not continue in the grantee, nor pass to the creditors, but remains in herself. The force of such reasoning is not perceived. If the creditors by avoiding the deed were in the same condition as if it had never been made, they could levy on the husband's interest and sell the same, subject, however, under the Missouri statute, to the wife's inchoate right of dower. But as she has parted therewith by a deed valid between her and her grantee, how is the latter divested of the rights he acquired from her and not from her husband, over which her husband had no control, and how are those divested rights restored to her in opposition to her deed? If her conveyance to him operated only by way of estoppel instead of grant, how is she relieved of the estoppel? It cannot be contended that the moment the

husband's right to the fee passes from him she has no inchoate dower. The very object of the statute is to prevent that result. If her husband then parts with his right and she with hers, and it is adjudged that her husband's acts were fraudulent and void whereby his interests in the realty remain subject to his creditors' demands, how is it that her relinquishment to her grantee is no longer valid or obligatory? If resort be had to the intrinsic nature of their respective interests, and the right of each to convey or relinquish the same—how can the reinvestiture of his interests in him work against her estoppel a transfer of her rights to her against the will of the grantee. If the reasoning on which the main proposition rests in such cases be correct, then the interest of the wife should be held still to remain in the grantee. There is nothing in the technical distinction between estoppel and grant to change that result. It is immaterial which way he holds, by estoppel or grant, if he holds by virtue of an act valid as between her and him.

If the deed is void only as to her husband's creditors, she is not affected by his acts, for they could not reach her inchoate dower. She had a right to part therewith or not, as she pleased, and having voluntarily parted therewith, how is it that against her estoppel it is restored to her despite the will of the grantee?

Can it be said it is so inherent in and inseperable from her husband's estate that it cannot be severed therefrom. If so, how is it that if he make a deed and she does not join therein, his estate passes and her inchoate right does not? Her right of dower in such a case remains severed necessarily, so to speak, from the fee in her husband or is still a charge upon the estate into whomsoever's hands it may pass. If then it is severable, and her acts may pass it, is it contended that it does not pass unless her husband joins, and consequently when his act in joining is void, hers is also void. If that be so, why is it that her act is made to depend on her unrestrained and voluntary action free from his control or influence—that only her free and uninfluenced conduct

suffices to divest her of what otherwise would still be her exclusive interest, and that she is held to be estopped when she thus acts? If the avoiding of the deed by the creditors enables them only to reach such interest in the husband as could have been reached if the deed were never made, then they can sell subject to the dower; but that right in them is far from determining that as between her and the grantee, she is not estopped from denying that the latter is entitled to the value of such dower interest. Indeed, the very course of reasoning employed by those who contend for the doctrine that the dower is still in her should leave the interest in the husband's grantee; for the husband's deed is void not as between him and his grantee, but only as between him and his creditors, and her deed is wholly irrespective of the creditors—takes nothing from them which they could reach, yet estops her.

Hence, if the dower interest remains outstanding despite such a fraudulent conveyance when it would have passed by a valid conveyance, and the conveyance is valid as between her and her grantee, in whom is it outstanding? How can it possibly be in her? If in any one must it not remain in the grantee?

Similar questions arise as to the homestead interest of the husband, and in many respects are to be determined on like considerations. On this subject there is also a conflict of decisions. The grantor's homestead is exempt from execution, yet he has a right to convey the same voluntarily. If he does convey all of his interests in his realty, including his homestead interest, and the deed is valid as between him and his grantee, but void as to his creditors, what becomes of the homestead interest? Evidently if the deed were not void, it would be merged in the estate conveyed. If the deed be adjudged void as to creditors, how is it that the homestead interest is severed and revived, so that the creditors take the debtors' original interest charged with the homestead? If they so take, in whom is the homestead, in the grantee or grantor? If the grantee paid a valuable consid-

eration for the fee divested of the homestead, why should the creditors, in avoiding the deed as to them, be in a better condition than if the deed were never made? If it were never made or void as to them *ab initio*, they could not reach the homestead, the deed being valid as between parties; those claiming *under* the grantee like the grantee himself could insist that the homestead interest passed and was merged; but the creditors claim adversely to the deed, and therefore are not in a position to demand what the grantee might claim under it. If then, the creditors, by avoiding the deed *in invitum*, take whatever by law they can take *in invitum* and no more, where is the homestead interest? By the deed it was merged or extinguished. How is it again revived and severed, and for whose benefit? The grantor has parted with it, and he ought not to claim against his deed. Is it, then, a revived or severed interest outstanding in the grantee? If so, on what legal principle?

The homestead interest in Missouri belongs only to the head of a family, and pertains to premises which he uses as a homestead, those premises being owned by him. When he ceases to own them or use them as his homestead, they cease to be such. One person cannot have a homestead in another man's property. Therefore, so soon as the debtor granted all his title to the property to the grantee, his ownership ceased, and he ceased thereby to have any homestead therein. If the deed be adjudged void as to creditors, and thereby his general ownership remains for the benefit of his creditors, is he necessarily restored to the homestead interest which was not conveyed to escape his creditors because they could not reach it, but which he could thus voluntarily convey? The conveyance of his homestead interest not being prejudicial to his creditors, why should not the grantee thereof hold the same? If the deed were absolutely void as to all the world, then the homestead being in the debtor could not be reached by the creditors. If it were merged in the grantee's estate, and must stand as valid between the grantor and grantee, and if the deed was void only as to

creditors, so that they could subject to their demands merely what could have been so subjected if the deed had never been made, then the homestead must remain in the grantee. If under the statute the homestead is set apart *in specie* out of the premises conveyed, or is sold and the prescribed sum in lieu thereof is paid, to whom should the sum be paid, or for whom the land set apart? If not to the creditors, should it not be to the grantee instead of the grantor?

If the grantee had paid therefor, why should it not be his instead of the grantor's? Without pursuing this mode of analysis farther, which has served to create the conflicting decisions cited, it may be well to seek the solution in clearly established principles easily comprehended. It may be premised that on principle, there can be no distinction fairly drawn between the dower and homestead interests involved, for each belongs to the individual grantors and could not be taken *in invitum*, yet each had an indisputed legal right to part therewith voluntarily.

The homestead right depends on two elements: *first*, the ownership of the premises by the head of a family; *second*, his *use* of them as a homestead.

No one can dispute that the ownership of lands not occupied as a homestead is subject to execution under the Missouri statute, nor can it be successfully contended that abandonment of the premises as a homestead does not leave them subject to creditors' demands—they remain free from creditors' judgments—in other words, only so long as they are homesteads. When, therefore, the owner and occupier voluntarily executes a conveyance therefor, why should not the law raise the presumption that as the possession follows the deed, the homestead is abandoned. When abandoned before a deed is made, a conveyance clearly passes the estate free from a homestead right; and after such abandonment the premises would, before a conveyence, be equally subject to execution. If then a voluntary conveyance of the fee carries with it the homestead, does it not *eo instante* operate an extinguishment of all homestead interests—work a com-

plete merger of that interest in the fee? Is that not necessarily so? *First*, from the absence of ownership in the grantor, and *secondly*, from absence of his use of the premises for a homestead? The grantee might purchase in order to obtain a homestead for himself, and having become owner and occupier, his own right of homestead would spring therefrom. There could not be an outstanding homestead in another person and an actual homestead in himself at the same time. Hence the deed of the debtor merged, so far as he was concerned, his whole interest in the grantee, and there was from the instant the deed was executed no such interest as the grantor's homestead remaining. The title passed just as free from a homestead interest as if none had ever existed. The debtor having thus fraudulently conveyed to the grantee and extinguished his homestead interest, whatever passed to the grantee remains subject to the creditors' demands. The grantee cannot hold against the adjudged fraud; the grantor cannot reclaim against his grant. The merger of the homestead interest by the grant enures to the benefit of the creditors whom it was sought to defraud, because the abandonment of use and ownership by the deed was an annihilation of the homestead, thereby leaving the premises like any other realty owned by the grantor, to which no pretence of a homestead interest ever obtained.

The same course of reasoning must necessarily mark a like result as to the inchoate dower—it was extinguished.

These views are not in accord with the opinions of many able judges; but no other conclusion seems defensible on a well-considered analysis of the many legal principles involved, if the owners of a homestead or of a dower interest can lawfully part therewith by a voluntary conveyance, and if, when they so part with such interest, they are so merged in the fee as to be extinguished—to no longer exist as separate or severable interests—why should they, when their fraud avoids their conveyance as to creditors, recover against

their own deeds or estoppels what they have absolutely and solemnly parted with?

And why should the fraudulent grantor be permitted to sever from the fraudulent grant or recreate therefrom interests already merged and extinguished in order to save from the consequences of his fraud some portion of what he sought fraudulently to acquire. The consequences of such merger he must suffer; just as others do in fraudulent confusion of goods or interests. The law will not revive extinguished or merged interests to unravel for his benefit the tangled web of fraud he has woven. He had a right to abandon his homestead and thus subject it to execution and he has done so. The demurrer under the views thus expressed will have to be overruled notwithstanding the court holds that there is no interest remaining in Sauer or his wife, if the allegations of the bill be true. They, it is charged, claim respectively homestead and dower interests, though the deed was fraudulent as to creditors, and therefore they are proper parties. The title which the plaintiff seeks involves their demands and also their acts, and a judgment would not meet the exigencies of the case unless they were concluded thereby. The demurrers are overruled.

As to dower: 1 Scribner on Dower, 610 *et seq.*; *Robinson* v. *Bates*, 3 Met. 40; 1 Washburne R. P. 203; *Sumners* v. *Rabb*, 13 Ill. 483; *Richards* v. *Talbird*, Rice Eq. Rep. 158; *Stinson* v. *Sumner*, 9 Mass. 143; *Blair* v. *Harrison*, 11 Ill. 384; *Woodworth* v. *Page*, 5 Ohio, 70; *Manhattan Co.* v. *Evartson*, 6 Paige Ch. 457; *Malony* v. *Horan*, 52 Barb. 29; *Meyer* v. *Moher*, 1 Robinson S. C. Rep. 333; *Stewart* v. *Johnson*, 3 Har. N. J. 87. As to homestead: *Castle* v. *Palmer*, 6 Allen, 401; *Getzler* v. *Saroni*, 18 Ill. 518; *Caswell* v. *Williams*. 12 Ill. 390; *Hershpetdt* v. *George*, 6 Mich. 496; *Sears* v. *Hanks*, 14 Ohio, 298; *Riper* v. *Johnson*, 12 Minn. 60; *Gardner* v. *Baker*, 25 Iowa, 347; Rev. Code of Mo. 1865, 449, sec. 1, *et seq.*

NEW YORK COURT OF APPEALS.

A person about to engage in a new business, may not, with a view thereto and for the purpose of securing his property for the benefit of himself and his family, in the event of losses occurring in such new business, convey such property to his wife, voluntarily, without consideration. Such a conveyance is fraudulent and void as to subsequent creditors.

It must be so declared, notwithstanding it be distinctly found that the conveyance was made without any intent to defraud creditors then existing.

CASE v. *PHELPS et al.*

Appeal from an order of the supreme court in general term in the sixth district, reversing a judgment entered upon the report of a referee and ordering a new trial.

The action was brought on the fourth of October, eighteen hundred and sixty, by the plaintiff, a creditor of the defendant, Elbridge G. Phelps, by judgment recovered on the fourteenth of June, eighteen hundred and sixty, for moneys paid as his surety upon notes dated in March and April, eighteen hundred and fifty-five, and given by Phelps for money then borrowed. The object of the action is to set aside certain two conveyances claimed by the plaintiff to be fraudulent and void as to creditors of Phelps, one executed by Elbridge G. Phelps and Mary D., his wife, to Willard Phelps, dated December eighteen, eighteen hundred and fifty-four, recorded March fourteen, eighteen hundred and sixty, conveying a piece of land with a hotel thereon, in the village of Ithaca, the other executed by the said Williard Phelps to the said Mary D. Phelps of the same date and recorded June eleven, eighteen hundred and fifty-five, conveying the same premises.

The answer of the defendants denied all fraud; denied that at the date of the conveyances, Phelps was indebted; averred that the premises were conveyed to the said Mary through the said Williard in good faith, subject to certain two mortgages thereon without any intent to defraud creditors or other persons, for the *bona fide* purpose of giving up the premises and the management of the public house to the

said Mary, that she might, in conducting the business, discharge the incumbrances and support herself and family, the said Elbridge proposing to travel abroad and engage in the business of a public exhibition; that the said Elbridge has since that time been principally abroad, and the said Mary has managed the said public house in her own name, and therein by her care and attention has supported herself and children and paid off one, and a portion of the other mortgage; that the plaintiff had no claim against the said Elbridge when the conveyances were made, and cannot question them; that the delay in recording the deeds was caused by mere inattention and not by any fraudulent design or purpose, and the plaintiff was in nowise defrauded or misled thereby into signing the notes; that the said Mary is the sole owner of the premises, and they are not subject to any lien in favor of the plaintiff.

The referee reported in favor of the plaintiff, and found as facts:

The signing of the notes by the plaintiff as security for the defendant Elbridge, their payment by him and judgment therefor and execution returned unsatisfied; the ownership of the premises, by such defendant, in eighteen hundred and forty-nine, and the occupation thereof as a hotel, by such defendant and his wife with no apparent change of ownership down to the commencement of this action, except the recording of the deed from Williard Phelps, June eleventh, eighteen hundred and fifty-five.

That the deeds in question were executed in the city of New York on the dates above mentioned, and were recorded as already stated, each of them expressing a consideration of four thousand eight hundred dollars.

That the conveyances were voluntary and without any real consideration, but without any actual intent to defraud the creditors of said Elbridge G. Phelps, then existing.

That he then owed about seven hundred dollars, and that said conveyances were made with a view of said Phelps engaging in a traveling Indian show, and to secure said pro-

perty for the benefit of himself and family against any losses that might occur in said show, and that said Phelps in said show business, did sustain heavy losses and became entirely insolvent.

That the property was then worth five thousand five hundred dollars, and was encumbered by two mortgages amounting to from three thousand two hundred dollars to three thousand five hundred dollars, which (excepting about two hundred and fifty dollars,) has been paid from the proceeds of said hotel, such proceeds being produced by the joint labors of the said Elbridge and Mary, his wife, in carrying on the business thereof. That in eighteen hundred and sixty-one, (pending this suit) the said Mary leased the hotel to James Davison for one year at a rent of seven hundred dollars.

His conclusions of law are that the plaintiff is to be deemed a creditor, as of the time of signing the notes as security. That the deeds are fraudulent and void as against the plaintiff.

That the said Mary is entitled to no subrogation to a priority of the plaintiff, by reason of the payments made on the mortgages. And he ordered judgment for the plaintiff for the payment of his judgment out of the property; for the appointment of a receiver to collect the rents and apply them in satisfaction of the plaintiff's judgment, with leave, if the rents shall not satisfy the judgment and costs, to apply to the court for an order to sell the premises for that purpose.

Judgment being entered in conformity with the direction of the referee the defendants appealed, and the supreme court reversed the judgment and ordered a new trial in November, eighteen hundred and sixty-two, in the following terms: "Judgment reversed and new trial granted; costs to abide the event."

The opinion of the supreme court pronounced by justice Mason, places the reversal on the sole ground, that the finding of the referee, that the conveyances to the defendant Mary D. were voluntary and without consideration was

against the evidence, but the order of reversal does not so state. The plaintiff stipulated and appealed to this court.

FERRIS & DOWE for the appellant.

SAMUEL LOVE for the respondents.

WOODRUFF, J.—In view of the clear and explicit language of sections two hundred and sixty-eight and two hundred and seventy-two of the code of procedure, and the repeated decisions of this court in conformity with their requirement, many of which have been reported, it seems hardly necessary to say that this appeal brings to us for consideration, questions of law only, and we must therein assume that the facts are correctly found and upon sufficient evidence. It is not stated in the judgment of reversal, that the judgment below was reversed on questions of fact. *Crocker* v. *Crocker*, 31 N. Y. 507; *State of Michigan* v. *Phenix Bank*, 33 id. 10; *Peterson* v. *Rawson*, 34 id. 370; *Marco* v. *L. & L. Ins. Co.*, 35 id. 664, and several cases in which the point is incidentally mentioned, not yet reported.

We have no discretion; and, therefore, although the reason for reversing the judgment assigned in the opinion of the supreme court, that the finding of the referee, that the deeds in question in this cause were voluntary and without consideration is against the evidence, we are not at liberty to affirm the decision on that ground, however fully we might concur therein, if at liberty to examine the evidence upon that question.

If this want of jurisdiction enables the plaintiff to avoid the effect of a proper order for a new trial, an order to which the defendants were justly entitled, and the avoidance of which may work injustice to them, it is not due to any defect in the law but to the unfortunate omission to insert in the judgment of reversal (as the code in such case permits) the grounds of the judgment appealed from.

Our statute (2 R. S. 137) declares that a conveyance shall not be declared fraudulent and void, solely on the

ground that it was not founded upon a valuable consideration.

The same statute declares that the question of fraudulent intent shall, in all cases, be a question of fact.

The referee has, in this case, found, distinctly and affirmatively, that the conveyances in question, although without consideration, were made without any intent to defraud the creditors of the judgment debtor then existing.

Under such a finding of fact it would be difficult for a court of review, having jurisdiction to consider questions of law only, to say that the conveyances in question were not as to such existing creditors perfectly fair and valid.

And if the referee had made a like finding in regard to contemplated future indebtedness, and creditors in whose favor it might arise, then, however, it might be competent for the supreme court to reverse it as against evidence, we, in reviewing a judgment of reversal which was not placed upon the question of fact, would still be compelled to say that the finding is conclusive and the conveyances valid, unless the other facts found showed a case of fraud in fact, which made the finding not only inconsistent, but erroneous in law.

The referee here has not, *in terms*, declared, that, as a question of *fact*, he finds any fraud whatever; it does not appear by his findings that at the time of the conveyances Phelps was not a man of wealth, and that having respect only to his *then condition* and business, such provision for his wife and family (if provision for them was the sole object) would not be in all respects reasonable, fair and proper, leaving still in his hands an abundance wherewith to pay all the debts which he owed or contemplated as possible. Such a state of things, though not affirmatively found, might be presumed in support of what he did find, viz: that although he owed seven hundred dollars, these conveyances were not made with intent to defraud his then existing creditors, and if not, then, as a question of law, the conveyances are valid as to them.

How then stands the conveyances as to subsequent creditors?

That a conveyance made for the purpose of hindering, delaying and defrauding future creditors is within the statute and void, cannot be questioned. Such a conveyance, though the grantor be wholly free from debt at the time, is within the terms and intent of the statute.

If the finding of the referee amounts to a finding to that effect, it is not vital to its support that it should be expressed in the terms of the statute.

He has been careful in this case to confine his exoneration of Phelps from fraudulent intent to his purpose in regard to existing creditors. As to subsequent creditors, he finds in other language what his actual purpose was. Without reciting the report at length, the facts found by the referee may be condensed into the following statement:

On the eighteenth of December, eighteen hundred and fifty-four, Elbridge G. Phelps, being the owner of land and a hotel thereon of the value of five thousand five hundred dollars, but mortgaged for three thousand five hundred dollars, and being indebted otherwise to the amount of seven hundred dollars, voluntarily, without any consideration, conveyed the same, mediately, to his wife without any intent to defraud his then existing creditors, but with a view to engaging in a new business, and to secure the property for the benefit of himself and family, in the event of losses occurring therein. The deed by which he parts with the title is not placed upon reoord, and he and his family continue to occupy the property without any change in the possession or apparent ownership. He thereupon borrowed money; the plaintiff without knowledge of such conveyances and believing him still to own the premises became surety for the repayment. He engaged in such new business, and therein sustained losses and became insolvent. The question thereupon arising, is this: Is the conclusion of the referee (declared by him to be a conclusion of law from the

foregoing facts) that such conveyance to the wife is fraudulent and void as against the plaintiff, erroneous?

In other words, may a person about to engage in business which he believes may involve losses, with a view to entering upon such business, convey his property to his wife, voluntarily, without consideration, to secure it for the benefit of himself and family in the event that such losses should occur?

I cannot regard this question, as in substance, other than the enquiry, may a man, for the purpose of preventing his future creditors from collecting their demands out of his property then owned, and *for the purpose* of casting upon them the hazards of his success in the business in which he is about to engage, convey his property without consideration to his wife, in order to secure the benefit of it to himself and family, however disastrous such business may prove, and continue in the possession, not even putting the deeds upon record until after such subsequent indebtedness arises?

This, it will be seen, is not merely a question whether a man may provide for his wife and family and thereby protect them against the hazards of a business in which he is about to engage, but whether he may put aside property for the benefit of himself for such a purpose. For it is immaterial that if the property once became the lawful property of his wife, it would not, under our present laws, be subject to his control. The legal efficacy of the arrangement which he makes to secure to himself the benefit of the property which he puts aside, is not the test of the validity of the transactions as against his creditors; the inquiry is, whether the conveyance (whether the plan and scheme be unskillfully or skillfully devised) was made to defraud creditors. It seems to me that the question above put can receive but one answer. The *facts* found constitute fraud, fraud in *fact*, in whatever terms it is expressed.

They in substance are a finding that with intent to defraud creditors whom he expected to owe, and whom possible losses might render him unable to pay, he made the

conveyance for the purpose of securing the property to himself and family, remaining in the possession of the property, and in the apparent ownership. This is fraud in fact, and none the less because the referee did not give it that designation in terms. *Stilman* v. *Ashdown*, 2 Atk. 481; 2 Story Eq. Jur. sec. 356 and note; *Taylor* v. *Jones*, 2 Atk. 601; *Parish* v. *Murphree*, 13 How. 99; *Black* v. *Nease*, 37 Penn. 438; *Savage* v. *Murphy*, 8 Bosw. 97, and cases cited; *Carpenter* v. *Roe*, 10 N. Y. 227.

Upon the ground that the finding of the referee amounts to a finding that the conveyances were made for the purpose of defrauding creditors, I think the order appealed from must be reversed, and the judgment entered on the report of the referee must be affirmed with costs.

Ordered accordingly.

UNITED STATES DISTRICT COURT—VERMONT.

An assignee in bankruptcy filed his petition in equity to prevent the consummation of an alleged fraudulent agreement entered into by the bankrupt and his brother-in-law the day before the filing of the petition in bankruptcy. Previous to this an action on book account had been commenced against the bankrupt by his brother-in-law.

The court decided that the action was properly brought in the United States district court, and that the agreement in question was fraudulent.

Perpetual injunction granted enjoining the brother-in-law to proceed no further in a suit pending in the state court against the bankrupt.

SAMSON, assignee, v. *BURTON et al.**

SHIPMAN, J.—This is a summary petition in equity brought by the assignee to prevent the consummation of an alleged fraudulent agreement entered into by the bankrupt, Alanson M. Clark, and Oscar A. Burton, his brother-in-law, who claims to have a very large debt against the bankrupt. The alleged corrupt agreement, so far as it is in writing, was entered into on the eighteenth of February, eighteen hundred and seventy,

* See 4 N. B. R. 1.

the day before the petition to put Clark into bankruptcy was filed.

From eighteen hundred and sixty down to the latter part of eighteen hundred and seventy, Clark and Burton had been exceedingly hostile, and had been engaged in a bitter and protracted litigation in the state courts of Vermont.

In eighteen hundred and sixty Clark brought an action of assumpsit against Burton in the Franklin County court, demanding seventy-five thousand dollars.

To this demand Burton filed a heavy claim in offset, and under a statute of Vermont which allows a defendant to recover in such cases when he proves a balance in his favor, Burton, at the April term of that court, in eighteen hundred and sixty-eight, recovered a judgment of about forty-six thousand dollars. Clark had, during the whole litigation, strenuously insisted that Burton's alleged claims against him were utterly false and fraudulent. He filed exceptions to various rulings on the trial, carried the case to the supreme court, and sought to have the judgment reversed and a new trial ordered. The case was, for reasons not necessary to state here, never argued in the supreme court. It was still pending therein at the January term, eighteen hundred and seventy, when Clark's counsel not being ready, filed affidavits and moved that it be continued to the next term of that court; whereupon Burton consented to a reversal of the judgment, and the same was reversed and a new trial ordered.

In August, eighteen hundred and sixty-seven, while the above suit was pending, Burton brought an action of book account (a form of remedy peculiar to Vermont and one other state) and attached Clark's property to the amount of one hundred thousand dollars more or less. The suit and attachment is now pending in the state court.

In an opinion upon a former hearing (4 N. B. R. 1) of this controversy, a history of this and other litigations between Clark and Burton is given, and need not be repeated here.

The following is the alleged fraudulent agreement entered

into between Clark and Burton in February, eighteen hundred and seventy:

"This agreement, made this eighteenth day of February, eighteen hundred and seventy, between Oscar A. Burton, of Burlington, in the county of Chittenden, and Alanson M. Clark of St. Albans, in the county of Franklin, witnesseth,

"1. The suit now pending in the Franklin county court in favor of said Clark against said Burton is to be non-suit without costs at the next term of said court.

"2. The suit in chancery now pending in Chittenden county in favor of said Burton against said Clark and Bradley Barlow is hereby discontinued without costs.

"3. The suit in chancery now pending in Franklin county in favor of said Clark against said Burton is hereby discontinued without costs.

"4. In the action of book account now pending in Franklin county court, in favor of said Burton against said Clark, wherein Timothy P. Redfield, Homer W. Heaton and Silas P. Carpenter are auditors, the said parties may file all claims included in their specifications in the suit in favor of said Clark above named and which is hereby agreed to be entered non-suit.

"And the said Clark may also file in said action his five promissory notes, each dated February first, eighteen hundred and sixty, and no obligation shall be made by either party to the determination on any of said claims by said auditors.

"And it is further agreed that the statute of limitation shall not be a bar or defense to said claim, or any of them, on either side, but that the auditors in said case shall hear and determine said claims upon their merits, under the proofs to be submitted to them.

(Signed) "A. M. CLARK,
"O. A. BURTON."

Upon the former hearing before this court, Burton was

perpetually enjoined from using this agreement in any manner, for reasons then fully given. The object of that injunction was to prevent Clark and Burton from controlling the litigation in the state court, in their joint interest, or in the exclusive interest of the latter, and to the detriment of the other creditors of Clark. It was insisted by the assignee that Burton had no right, by law, to transfer the claim which he had set up against Clark, in his plea of offset in the action of assumpsit, brought by Clark against him, to the action of book account and thus shelter it under his attachment in the latter suit, thereby gaining a preference over other creditors, as provided for in their agreement.

But while this court, as the case then stood before it, arrested, or intended to arrest the use of this agreement, it left the question of law as it stood before any agreement was entered into, to the determination of the state tribunal.

If under the laws of Vermont, Burton had the right to transfer from his place of offset in the pending assumpsit suit, the items there set up, to his pending book action, the state court would so decide, and if the decision was not satisfactory to the assignee, the latter could carry the case to the supreme court of the United States; if Burton had no such right, it was presumed that the state court would so decide.

But during the whole of the proceedings before this court, it was assumed, upon the evidence, that the action of assumpsit was still pending in the state court. It now turns out that Burton had caused this agreement to be filed in the state court as early as the third of April, eighteen hundred and seventy, and in pursuance thereof, the clerk of that court dropped the case, under a standing order of the court, from the docket. Afterwards, and after this court had issued its injunction against the use of the agreement in question, the assignee went into the state court and moved to have the case reinstated on the docket, which Burton successfully resisted. The result is that that action of assumpsit is out of court, and the question whether, under the law of Vermont,

Burton has the right to transfer his claim from a pending assumpsit to the book action no longer remains. It has been swept out of existence by the operation of this unlawful agreement, which this court has already decided was entered into by Clark and Burton with the knowledge of both that the former was on the eve of bankruptcy. Thus Clark and Burton, by a fraudulent agreement between themselves, have disposed of this question. Whether Burton can now set up claims in a suit in which he has attached nearly all the property of this bankrupt, which he has once attempted to enforce under a plea of set-off when he had no attachment, and thus secure what was before an unsecured debt, depends not upon the law and practice of Vermont courts, but upon the bankrupt law as administered by this court. To leave Burton now to pursue his book action, and cover all his alleged claims against Clark by his attachment bill in that action is to secure him and Clark the enjoyment of the fruit of their fraudulent agreement.

Upon the former hearing before this court, there was no very cogent evidence that the reversal of the judgment of forty-six thousand dollars in Burton's favor, was the result of collusion between Clark and him. It is true that the circumstances were peculiar and suspicious, but the fact of collusion was not satisfactorily proved. The proof adduced by the assignee at this trial on this point is ample. That before the reversal of the judgment, Clark and Burton had an understanding between them that this judgment should be reversed, and the suit discontinued, for the very purpose of allowing Burton to transfer his claim to the book action, and thus secure what was before an unsecured debt, or pretended debt, no unprejudiced mind, on reading the evidence now before this court, can have a doubt. Clark, in order to protect this arrangement, which was evidently part of a comprehensve scheme to cheat his creditors, in November, eighteen hundred and sixty-eight, retained, evidently with Burton's knowledge, two of Burton's counsel in all his (Clark's) matters, "except the Burton cases." I make no

imputation upon the counsel thus retained, but the fact of their being retained by Clark, and still remaining counsel for Burton, in the view of the former attitude of Clark and Burton, and in the light of the facts developed in this case, was, to say the least, a very extraordinary course on the part of Clark and Burton, and inconsistent with any other inference than these two men, who for ten years had denounced each other as villians, and who had each resisted the claims of the other as false and fraudulent, had, in view of Clark's impending bankruptcy, came to an agreement which they both knew would in due time be assailed by Clark's other creditors.

I cannot here detail all the evidences in support of this conclusion. One item of it, however, should be mentioned. A document in Clark's handwriting, and which was written as early as the last part of January, eighteen hundred and seventy, has been produced on this hearing, addressed to Burton. It conclusively shows that Clark desired and expected to enlist Burton in a scheme to deceive and defraud at least one of his other creditors. This paper was evidently not the first step toward an arrangement for their joint benefit. This document was delivered by Clark to one of Burton's counsel, who declined to state what he did with it, on the ground that to do so would violate professional confidence between him and Burton. It is true Burton swears that he never knew anything about this document, and has no connection with it directly or indirectly. It is equally true that he insists that his counsel shall be protected from disclosing what *he* did with it. A court of equity would be poorly employed in shutting its eyes to such a state of facts, and leaving these parties to dispose of a large part of this bankrupt estate in their own interest. I have not forgotten that Clark, after having admitted this document to be in his handwriting, subsequently on discovering its purport swore that it was not his. The fact, however, has been conclusively proved, both by competent witnesses, and by specimens of his handwriting, admitted by himself to be genuine.

In view of all the facts proved on this trial there can be no doubt but that Clark and Burton are collusively engaged in a scheme by which the book action in the state court is to be used for the purpose of absorbing a large share of the bankrupt's estate, which would otherwise have gone to the general creditors. For this purpose the judgment in the state court was reversed by consent in January, eighteen hundred and seventy. For this purpose the agreement of eighteenth of February, eighteen hundred and seventy, was made. For this purpose the agreement was filed with the clerk of the state court, and thus the action of assumpsit was non-suited. To prevent the defeat of this purpose Burton successfully reinstated. To effectually accomplish this purpose Burton claims the right to recover a judgment in the state court to the amount of not far from one hundred thousand dollars, secured under cover of his old attachment of all or nearly all Clark's property. If this court has any authority to prevent the success of this scheme it is bound to exercise it. If it has no such authority the assignee might as well surrender Clark's large estate to him and Burton, and let them divide it between them.

In the opinion delivered in a former stage of this controversy, and to which reference has already been made, I declined to enjoin Burton from proceeding in the state court, although his claim, which he was there prosecuting, constituted a provable debt against the bankrupt. But in doing so I assumed upon the proof then before me that the action of assumpsit of Clark against Burton was still pending, and that the reversal of the judgment in that suit was not procured by collusion. I enjoined the use of the agreement of the eighteenth of February, eighteen hundred and seventy, thus leaving, as I supposed, the liquidation in the state court to be prosecuted and defended by Burton and the assignee, upon the grounds of law and fact, as the cases would have stood had the judgment in assumpsit been reversed *bona fide*. Upon the facts now in proof, I find that that judgment was reversed by collusion between Burton and Clark, and that

notwithstanding the injunction against the use of the agreement of February eighteenth, eighteen hundred and seventy, the latter had in fact been so used as to give Burton the principal advantage, which it was the object of that agreement to confer. To allow him now to proceed with his book action in the state court is to stand by and see him reap the fruit of a fraudulent agreement with the bankrupt, under cover of that action. It is possible that the assignee could successfully resort to the equity side of the state court, and thus prevent the consummation of this fraud, but as this is a question peculiarly within the jurisdiction of this court of bankruptcy, I see no propriety in remitting the assignee to another tribunal. A perpetual injunction will therefore be granted against Burton and Clark, enjoining them to proceed no further in the book action commenced by Burton against the bankrupt in August, eighteen hundred and sixty-seven, and now pending in the state court.

UNITED STATES CIRCUIT COURT—NORTH CAROLINA.

The circuit courts of the United States have not jurisdiction of a case either at law or in equity, in which a state is plaintiff against its own citizens. The constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of congress. Such jurisdiction is not conferred upon the circuit court in this case by the bankruptcy act of eighteen hundred and sixty-seven, because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain his suit in any court.

THE STATE OF NORTH CAROLINA v. *TRUSTEES OF UNIVERSITY and C. DEWEY, Assignee, et al.*

BROOKS, J.—The attention of the court has not been invited to the question of jurisdiction in this case, by either the complainant or respondent, in their arguments. Yet, that is a question to be considered in the opinion of this court, and the first properly demanding attention.

All the authority vested in the courts of the United States

to hear and determine causes arises under the provisions of the constitution of the United States or acts of congress.

By the provisions of the constitution the supreme court of the United States is established, and its jurisdiction prescribed directly; and it is further provided that congress shall have power to create or establish inferior courts.

Then, we think that it necessarily follows that congress has the power to prescribe the jurisdiction of such courts. We are sustained in this view by the opinion in the case of *Osborne* v. *The United States Bank*, 9 Wheat. 738, and *Sheldon* v. *Gill*, 8 How. 448.

The second section of the third article of the constitution relates to the subjects or classes of cases declared to be within the jurisdiction or power of the United States courts, and is as follows:

"The judicial power shall extend to all cases in law and equity arising under this constitution; the laws of the United States and treaties made, or which shall be made under their authority; to all cases affecting embassadors; other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states;" and lastly, "between a state or the citizens thereof and foreign states, citizens or subjects."

If the framers of our constitution had proceeded no further, it might be contended with more reason than this suit, as instituted, comes within the jurisdiction intended to be conferred upon the circuit courts. But, as if to leave no doubt upon the subject, they proceed in the second clause of the second section of the third article to enumerate the classes of cases over which the supreme court shall have original jurisdiction, and with these we find all cases affecting embassadors, other public ministers and consuls, and those in which a state shall be a party; and it is further provided,

that as to all other subjects included within the jurisdiction prescribed—the supreme court shall have appellate jurisdiction.

It may be said that though original jurisdiction is by this provision of the constitution conferred upon the supreme court, it is not exclusive, but only concurrent with some other tribunal.

We think that a fair construction of the language of the constitution excludes such a conclusion, and we are happily sustained in this opinion by the opinion of the court in the case of *Gale* v. *Babcock*, 4 Wash. C. C. Rep. 199.

It will be seen that in this case it is decided that the circuit courts have no jurisdiction of a cause in which a state is a party.

If more authority should be desired upon this point, we refer to the case of *Osborne* v. *The United States Bank*, 9 Wheat. 820, in which it is declared—that in such cases in which original jurisdiction is conferred upon the supreme court, founded on the character of the parties, the judicial power of the United States cannot be exercised in its appellate form.

In the case before us, the state of North Carolina is complainant and the only complainant, and it is the character of that party that brings the case within the original jurisdiction prescribed for the supreme court—and consequently, according to the opinion of the court in the case last cited, is excluded from the appellate jurisdiction of that court.

We hold that it was not intended by any provision of the constitution or the laws to confer jurisdiction on this court in any case involving many thousands of dollars, (as in this case) without the right of appeal in the event either party should be dissatisfied with the decision of this court.

Again: In the cases of *Martin* v. *Hunter's Lessees*, 1 Wheat. 337; *Cohen* v. *Virginia*, 6 Wheat. 392, it is decided that in such cases as draw in question the laws, constitution, or treaties of the United States, though a state may be a party, the jurisdiction of the supreme court is appellate; for in such

a case the jurisdiction is founded, not upon the character of the parties, but upon the nature of the controversy. Such cases may be taken by appeal or writ of error, from the highest judicial tribunal of a state to the supreme court of the United States.

The great American constitutional judge, in delivering the opinion of the supreme court of the United States in *Cohen* v. *The State of Virginia*, before referred to, uses this language: "It has been also argued as an additional objection to the jurisdiction of the court, that cases between a state and one of its own citizens do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the Federal courts. The state tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another state; but not in proceedings by a state against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last. This is very true (says this learned judge) so far as the jurisdiction depends upon the *character* of the parties.

"If the jurisdiction depended entirely upon the character of the parties, and was not given where the parties had not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the constitution and the laws of the United States would be mere surplusage. It may be true that the partiality of the state tribunals, in ordinary controversies between a state and its citizens was not apprehended, and therefore the judicial power of the Union *was not extended to such cases.*"

The ground, as it is seen, that the jurisdiction of this court is claimed in this case depends upon the character of the parties, and not the character of the subject in controversy.

All we have said, it will be observed, relates more particularly to the provisions of the constitution, and in regard to the prescribing and the distribution of the judicial power of the United States.

The act of seventeen hundred and eighty-nine, section twenty-four, is the first whereby congress undertook to prescribe the jurisdiction of the circuit courts, and we find by the seventeenth section of that act that such courts are vested with original cognizance concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds a certain sum stated, and the United States are plaintiff or petitioner, or an alien is a party, or the suit is between a citizen of the state where a suit is brought and a citizen of another state.

It is quite clear, we think, that the provisions of this act do not embrace a case in which a state is a party.

This question, however, was raised soon after the passage of the act in the case of *Gale* v. *Babcock*, before referred to, and in this case it was decided that the circuit courts had no jurisdiction between a state and its citizen, or citizens of other states.

It was at one time supposed that the constitution gave a broader power to the courts. But it has been long since settled that the civil jurisdiction of the circuit courts is governed by the acts of congress. *Turner* v. *Bank of North Carolina*, 4 Dall. 10; *McIntyre* v. *Wood*, 7 Cr. 506; *Kendal* v. *United States*, 12 Pet. 616; *Cary* v. *Curtis*, 3 How. 245.

But the power to entertain this suit is claimed by counsel for this court under the provisions of the bankrupt act of eighteen hundred and sixty-seven. After a careful examination of the provisions of that act, we are of opinion that it was not designed to confer, and does not in fact confer such power.

If we could believe that the original jurisdiction conferred by that act upon the circuit courts was as full, or equal in all respects to that conferred upon the district courts, we could not regard it as intending to produce so inevitable a conflict with the provisions of the constitution before referred to, limiting and restricting, according to our construction, the

original jurisdiction in cases in which states are parties to the supreme court.

We hold that no such jurisdiction as that contended for in this case was intended to be conferred upon this court; and further, if it was clearly otherwise, that any attempt to do so on the part of congress would be ineffectual; for, as has been before seen, the constitution having itself provided that the jurisdiction in such cases should be original in the supreme court, it must be regarded as exclusive of the other courts of the United States—as much so as if the term *exclusive original jurisdiction* had been employed. And this appears to us to be the view entertained by the court in the case of *Osborne* v. *The United States Bank*, before cited.

It has been suggested that there is a greater necessity for the exercise of jurisdiction by this court in this case, because, as is insisted by the bankrupt law, the jurisdiction conferred upon the district and circuit courts of the United States is exclusive, and that no suit by or against an assignee can be maintained in the state courts.

We agree that the only jurisdiction *actually conferred by that act* is with these courts; but it does not follow that an assignee may not sue or be sued in the state courts, and we think that an assignee may sue or be sued in the state courts.

If we entertained the opinion that all controversies respecting a bankrupt's estate could only be heard and determined in the district or circuit courts of the United States, we confess that we would express the view we entertain with much more hesitation than we now feel.

Let the bill be dismissed.

UNITED STATES DISTRICT COURT—E. D. MICHIGAN.

A petition for the removal of an assignee was filed, charging collusion with his brother, incompetency, and involving the estate in unnecessary litigation. The court held that there was a failure to prove the first two charges, and that in regard to the third, if he has erred through erroneous legal advice, it may be cause for ordering him to employ other counsel, but not necessarily for his removal.

Prayer of petitioner denied. Costs ordered to be paid out of bankrupts' estate.

In re BLODGET & SANFORD.

On the petition of Constant C. Pond, a creditor, on whose petition the bankruptcy proceedings were commenced, for the removal of David B. Hibbard, Jr., as assignee. Answer was put in by the assignee substantially denying the allegations of the petition, and proofs have been taken before register Eugene Pringle, to whom it was referred for that purpose.

Mr. W. K. GIBSON, for petitioner. Mr. J. G. DICKENSON, for the assignee.

LONGYEAR, J.—The grounds for removal as set up in the petition and claimed on the argument are:

1. Collusion with one W. R. Hibbard, a brother of the assignee, in the sale to the former by the latter of the stock of goods constituting the entire property assets of the bankrupts' estate, in consequence of which a less sum was obtained than what might have been realized.

2. Incompetency.

3. Involving the estate in unnecessary and unwarranted litigation.

The bankrupt act, section eighteen, provides, "That the court, after due notice and hearing, may remove an assignee for any cause, which, in the judgment of the court renders such removal necessary and expedient." This provision places matters of this sort in the discretion of the court. Such discretion is, however, a legal discretion, and can only be exercised to remove an assignee when cause is shown,

rendering such removal either first, necessary, or second, expedient.

An extended analysis and review of the voluminous testimony which has been taken, in the view which the court entertains of the case, is unnecessary, and would extend this opinion to an inconvenient length to no profitable purpose. Suffice it to say that I have carefully examined all the proofs, and given full consideration to the same, as well as to the able arguments of counsel on both sides, and I find that the charge of collusion in the sale of the stock of goods is not made out. There were irregularities attending that sale, which, unexplained, were sufficient to cast suspicion upon the good faith of the transaction, and in my opinion, to justify an enquiry into it. But, as explained by the proofs, I fail to see any intentional wrong, collusion or bad faith.

It is complained that the assignee advertised the goods to be sold at public auction on a day within the time during which he was authorized by an order of court, to sell at private sale, thus inducing persons desiring to purchase to refrain from making offers at private sale, in hopes, of course, of getting the goods at a less price at the public sale. While it was clearly irregular thus to advertise, yet I fail to find any direct proof that it was done collusively or for the purpose of misleading those desiring to purchase. If, however, such would have been the necessary or even probable effect of the notice, then the intention that it should have such effect might be presumed, and probably would be, unless rebutted by the assignee. I find, however, from copies of the notices before me, that it was distinctly advertised that the stock was for sale at private sale in the meantime. I know some criticism was passed upon the effect of the language used in this respect in the notice, but I am clear that the language is such that no man of ordinary intelligence could have been misled for a moment. The notices therefore carry upon their face a rebuttal of any intention to mislead, or that they could have that effect even if intended.

It is claimed that by waiting till the day advertised, and selling at public auction, the goods would have brought a better price. I fail to find support for that claim in the proof. The proof in this respect rests entirely upon the opinions of witnesses, some putting the probabilities above and some below the price sold for, but no large difference either way. If the sale made by the assignee was open and fair in all other respects, and was, according to the best of his judgment, with the information he then possessed, the best that could be done, he cannot be convicted of fraud or collusion on the mere varying opinions of men as to what might have been done by waiting, nor even on proof that some one stood ready to pay more for the goods, unless it is also shown that such fact was known to the assignee when he accepted the offer which he did accept.

While the legal right of the assignee to sell to his brother, all other circumstances being equal, in preference to others, is conceded, yet his having done so is very properly alluded to as a ground for suspicion; and it is claimed that he so sold to his brother while there were offers at a better price pending. There was one better offer made, but in hopes of getting still better offers the same was not accepted at the time. When, however, the assignee had concluded to accept it, the offer was withdrawn, and the matter was again left upon his brother's offer as the highest that had been made. That there was no higher offer pending when he accepted his brother's offer clearly appears by the proof.

The brother's offer was made five or six days before it was accepted. During this time it was freely talked about by the assignee, and also by the brother. It was made use of with others who, it was thought, might desire to purchase, to obtain a better offer. Creditors were consulted, even the petitioner, in the matter, and no objection seems to have been made to a sale to the brother if he would pay as much, or more than any one else. To my mind the proof is clear, that the assignee used all reasonable diligence to obtain a higher price before accepting the offer of his brother.

During the five or six days that elapsed between the offer for the goods and the acceptance, the assignee was selling at retail, and at the time of the sale had realized about two hundred and fifty-five dollars in cash. This he turned over to his brother, and then the same money was paid back to him on the purchase price. This was certainly a suspicious circumstance, and had a bad look for the assignee. The assignee and his brother, however, explain the matter in this manner: The offer was thirty per cent. of the appraised value for the whole stock before any sales had been made. When the offer was accepted, it was deemed to relate back to the time when the offer was made, and the money was turned over with the stock that remained, in lieu of the goods which had been sold. This explanation removes all suspicion of any fraud on the estate having been intended, and leaves it to stand as an irregularity merely, evidently resulting from a misapprehension by the assignee of his powers and duties as assignee. Such a transaction would, of course, have been perfectly competent for a person dealing in his own right, with plenary powers of disposition over his own property. But not so with the assignee. He must keep within his powers as conferred by the law, and the orders of court under which he acts. Here he was acting under a special order of the court authorizing him to sell goods at private sale—not the money he might receive for the goods. When he had once sold any portion of the goods and received the money for them, his power under the order, so far as the goods so sold were concerned, was at an end. He could not resell the goods, nor could he sell the money he had received for them. But I will not now decide what effect the mistake will have upon the assignee in the settlement of his final accounts, where the question may very properly arise. All I intend to decide now is, that it was a mere mistake, and not a device to defraud the estate.

Although the sale was made in terms for cash, the assignee in fact waited a few days for a part of the purchase money, but the whole amount was eventually paid to him.

This, of course, he had no legal right to do and if any injury had come to the estate on account of it, the assignee and his bail would have been liable. Although this act was an irregularity, and perhaps may savor of favoritism under the circumstances, yet as the estate was perfectly secure, and the whole amount was in fact realized according to the terms of the sale, I fail to see in it, in and of itself, such evidence of fraud or collusion as would warrant the court in resorting to the severe measure of removal for that cause.

So much as to the first ground alleged for removal, viz: that of collusion. The second ground, that of incompetency, will be considered last.

The third ground, that of involving the estate in unnecessary and unwarrantable litigation, is based upon the fact that the assignee commenced a suit in the United States circuit court for this district, by bill in equity against the petitioner here, in relation to certain personal property to which it was alleged said Pond claimed title; and which suit, on an intimation from the court that bill in equity was not the proper remedy, was discontinued by the assignee.

It is proven that the assignee in conversation with Pond and his counsel, before said suit was commenced, said that he believed, or had no doubt, the property in controversy belonged to Pond. But this did not conclude the assignee. If he were afterward to change his mind upon obtaining advice of counsel, or otherwise, or if the creditors or a respectable number of them should demand that the question be submitted to judicial decision, the assignee would be perfectly justifiable in so submitting it. If adopting a remedy to test the question which the court should decide to be a wrong one is to be made a cause for removal, I fear that very many of the assignees in bankruptcy stand upon very precarious grounds. He may have done so under an erroneous opinion of his own, or under erroneous legal advice, which was probably the case in this instance, but so long as bad faith is not shown it cannot be alleged against him.

Erroneous legal advice, where the errors are so gross and

frequent as to be evidence of incompetency of the legal advisers he has chosen, may be cause for ordering the assignee to employ other counsel, but not necessarily for removing the assignee.

The whole case narrows itself down to the second ground alleged for removal, viz., that of incompetency.

The assignee is a young man of fair education and talent, but as yet with but little experience in the domain of law. The creditors, with but slight opposition, and that on the ground of his locality alone, have seen fit to place him where he is. And those creditors—and they are considerable in numbers and in the amount of their claims—now, after all that has been charged and shown against him, with the single exception of the petitioner, acknowledge themselves—some expressly and others tacitly—content to have him close up the estate. Under these circumstances it would be a severe penalty upon the assignee, and, as it seems to me, doing him an unnecessary injury, to remove him from his position because he has been guilty of unintentional irregularities in his administration of the estate—irregularities, too, which, as we have seen, have not operated, and cannot, to the injury of the creditors. If, however, such a step seemed to be necessary, or even expedient, I should not hesitate to adopt it. But it seems to me that such is not the case. If from the proofs before me, I could see even reasonable cause to believe that the sale of the stock of goods was for any cause invalid, and that it would be for the interest of the creditors that it should be further inquired into, the court would not hesitate to remove the present assignee and appoint a new one to make such investigation. But I fail to see any such cause; on the contrary it is patent to my mind that any attempt to invalidate that sale would result in nothing but a wasteful expenditure to the estate.

The sale of the stock then being valid, and there being, as I understand, no other assets to dispose of, so that, virtually, nothing is left to be done by the assignee but to render his final account and close up his trust, I cannot see that it

is necessary or expedient even, to change assignees. All that a new assignee could do would be to receive what is in the present incumbent's hands, and then proceed to do just what it is the duty of the present assignee to do, and what, if necessary, he may be compelled to do in the premises. That may just as well be done through the present assignee as to go through the unnecessary performance of a removal and appointment. Any questions which a new assignee might raise as to the legal liability of the present incumbent on account of any errors he may have committed, or as to any charges which he may make for disbursements or otherwise, can be raised just as well by any creditor upon the settlement of the assignee's accounts.

I cannot see, therefore, that a removal of the present assignee is either necessary or expedient. The prayer of the petition is therefore denied.

As to the question of costs. While unwarranted or vindictive attacks upon assignees ought to be not only discouraged, but punished, and the estates of bankrupts ought to be scrupulously guarded against unnecessary costs and expenses, yet, inquiry into the conduct and dealings of assignees, when their transactions are such, unexplained, as justly to give rise to suspicions of their honesty and good faith, ought not to be discouraged. The liability to such inquiry and investigation into their conduct will tend to make them vigilant and careful in the discharge of their duties. I have already said in the commencement of this opinion, that I consider this inquiry justifiable under the circumstances. I think, therefore, that the petitioner ought not to be mulct in costs. The assignee had the right and it was his duty to vindicate himself from the charges of collusion and bad faith, (and it is upon these points that most of the evidence was taken) and he has succeeded in doing so. I think, therefore, that he ought not to pay costs. It is therefore one of those cases in which the costs of the proceedings must be paid out of the estate. *In re* Mallory, 4 N. B. R. 38.

Ordered accordingly.—November 8, 1871.

UNITED STATES DISTRICT COURT—S. D. NEW YORK.

The assignees of certain bankrupts brought a bill against one of their creditors alleging that he had seized and sold on execution, certain property, thereby receiving a preference having reasonable cause to believe, at the time the levies were made, that the bankrupts were insolvent and that a fraudulent preference was intended.

The evidence showed that bankrupts had failed some months before the filing of the petition against them, and that between the failure and the seizure of the property, bankrupts were making compromises, as their debts matured, at the rate of forty-five cents on the dollar, nothing appearing to show that this creditor had reasonable cause to believe that there were any creditors not compromised with, and over whom he could obtain a preference. Bill dismissed with costs.

WARREN and ROWE, Assignees, v. *TENTH NATIONAL BANK et al.*

BLATCHFORD, J.—On a petition in involuntary bankruptcy filed February twenty-fourth, eighteen hundred and seventy-one in this court, Edmund P. Sanger and Walter Scott were, on the eleventh of March, eighteen hundred and seventy-one, adjudged bankrupts. The plaintiffs were, on the eleventh of April, eighteen hundred and seventy-one, appointed assignees, and an assignment in the usual form was executed to them on the fourteenth of April, eighteen hundred and seventy-one.

The bill alleges that on the twelfth of January, eighteen hundred and seventy-one, and within four months before the filing of the petition, the bankrupts, being insolvent, with a view to give a preference to the Tenth National Bank of the city of New York, which then had a claim against them, procured or suffered their property to be seized on two executions, amounting respectively to four thousand eight hundred and three dollars and forty-seven cents, and five thousand and fifty-one dollars and one cent, issued out of the supreme court of the state of New York to the sheriff of the city and county of New York; that under such executions, the said sheriff did, on the twelfth of January, eighteen hundred and seventy-one, levy upon and seize the property of the said bankrupts; that such executions were obtained upon actions

brought in the said supreme court by the said bank, to which the bankrupts interposed no defence, and in which they suffered and permitted judgments for said sums respectively to be entered against them on the twelfth of January, eighteen hundred and seventy-one; that the sheriff, under the instructions of the bank, remained in possession of the property until after the filing of the petition; that on the eleventh of March, eighteen hundred and seventy-one, an order was made by this court that the property be sold under the direction of the sheriff, and that he hold the net proceeds of the sale subject to the further order of this court; that thereupon the property was sold at auction, and the net proceeds, amounting to eight thousand nine hundred and ten dollars and fifty-seven cents, were received by the sheriff, who now holds the same under said order; that the bank refuses to release its alleged claims on the moneys and its alleged liens under the executions; that at the time of the entering of the said judgments, and of the issuing of the said executions, and of the said seizures thereunder, and of the said sales, the defendants had reasonable cause to believe the bankrupts to be insolvent, and that the executions and the seizures thereunder were issued and made and procured or suffered to be issued and made in fraud of the provisions of the bankruptcy act, and with a view to give the bank a preference, and to prevent the property of the bankrupts from coming to their assignees in bankruptcy, and to prevent the same from being distributed under the said act, and to defeat the object of, and impair, hinder, impede and delay the operation of said act; and that the defendants withhold and detain the proceeds of the said property from the plaintiffs with the intent and object aforesaid, and in fraud of the said act. The bill prays that the said seizures and executions may be declared fraudulent and void; that the plaintiffs may be declared to be entitled to the possession of the property so seized or the value thereof as assets of the bankrupts; and that the plaintiffs may recover the same from the defendants. The bill was filed on the nineteenth of April, eighteen hundred and seventy-one.

The question of fact principally contested in the proofs is, as to whether the bank, at the time the property of the bankrupts was taken on the executions, had reasonable cause to believe that the bankrupts were insolvent and that the conveyance and transfer of the property of the bankrupts made by such taking, was made in fraud of the provisions of the act, by being made with a view on the part of the bankrupts to give the bank a preference, or to prevent their property from coming to their assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of the act.

On the twenty-third of August, eighteen hundred and seventy, the bankrupts, under their firm name of E. P. Sanger & Co., made and delivered to one William H. M. Sanger, their check dated that day, drawn on the Central National Bank of the City of New York, payable to the order of said William H. M. Sanger, for four thousand eight hundred and ninety-one dollars and sixty-four cents. On the twenty-fourth of August, eighteen hundred and seventy, they made and delivered to said William H. M. Sanger, a like check for four thousand six hundred and fifty-one dollars and thirty-seven cents. These checks were endorsed and passed by William H. M. Sanger to the defendants, the Tenth National Bank. On presentment at the Central National Bank, payment of them was refused. A suit was brought on each of the checks against the makers and the endorser. The summons and complaint in each of the suits were served on Edmund P. Sanger on the third of November, eighteen hundred and seventy, and on Walter Scott on the twenty-ninth of November, eighteen hundred and seventy. A judgment was entered against them in each suit for want of appearance and of answer or demurrer, and against William H. M. Sanger, on the twelfth of January, eighteen hundred and seventy-one, the judgments being severally for the sums of five thousand and fifty-one dollars, and one cent and four thousand eight

hundred and three dollars and forty-seven cents. On these judgments the executions referred to were on the same day issued, and the levies made.

When the deputy sheriff made the levies he made a demand for the money. The debtors said in reply that they did not have the money at that time but expected to get it soon. The sheriff held possession for forty-five days of the property levied on, and it was then sold. The proceeds are in the hands of the sheriff. When the levies were made, part of the property levied on was already under attachment under process from a state court.

The firm of Sanger & Scott failed in September, eighteen hundred and seventy. It did not after that resume general payment of its debts, although it bought a few bills for cash. It did not after that meet any of its obligations except those specially arranged for and absolutely necessary to carry on its business. It owed, when it failed, from one hundred and fifty thousand dollars to two hundred thousand dollars. The reason why it did not pay the amounts claimed in the suits on the checks was that it did not have any money. A few days after the executions were levied, according to the bankrupt Sanger's testimony, he, in a conversation with the president of the bank, proposed to pay him two thousand five hundred dollars if he would withdraw the sheriff and vacate the judgments, but the president refused to do so, assigning as a reason that the bankrupts had not settled with all their creditors, and that the bank had to refuse in order to protect itself, but offered to take three thousand dollars in cash and withdraw the sheriff, but not vacate the judgments. Sanger says that this offer was refused by the bankrupts, and that the same offers on both sides were afterwards made and refused several times. The president of the bank testifies that his offer was to take forty-five per cent. of the claims and withdraw the sheriff and wait some time for the remainder. From the time it was so sued the firm was not able to pay the demands sued on, and it was not, from September, eighteen hundred and seventy, able to pay its debts in full.

The checks referred to were received on deposit by the bank from William H. M. Sanger, who kept an account with it. After the checks were dishonored, and before suit was brought on them, the president of the bank had an interview in regard to them with the two Sangers. The substance of the conversation was a request for the forbearance of the payment of the checks. One of the reasons assigned for the request was, that Edmund P. Sanger was going on nicely with his business, and expected William H. M. Sanger, who was his brother, to provide for them, and that any pressure on the part of the bank would embarrass Edmund P. Sanger. By reason of promises made for an earlier payment or settlement, the bank refrained from bringing suit. The president was assured by William H. M. Sanger, that his brother was in a most excellent condition; that the firm had failed, and had compromised some time previously, but was then going on nicely, and that it had a large stock of goods in process of manufacture and as soon as the autumn business opened would be able to make satisfactory arrangements. After the suit was brought the two Sangers urged very hard for an extension of time and it was given.

The president of the bank testifies that the understanding he derived from his conversation with the bankrupt, Sanger, after the levies were made, was that the firm had some time before compromised with its creditors at forty-five cents on the dollar, and that he had the same understanding when the suits were brought and the judgments were obtained, and was further informed that the compromise would leave them a very handsome surplus, that they had no considerable amount to pay until April, eighteen hundred and seventy-one, and that the prospect of their business was excellent. The president of the bank had no knowledge until after the levies were made, of the existence of any prior attachment on any of the goods levied on. It does not appear that any officer of the bank, except the president, had anything to do with any of the transactions in question.

Notwithstanding the provision of the thirty-fifth section of the act, that if the challenged transfer or conveyance is

not made in the usual and ordinary course of the business of the debtor, the fact shall be *prima facie* evidence of fraud, I do not see in this case any satisfactory evidence that the bank had any reasonable cause to believe that the debtors intended, by suffering the executions to be levied, to give the bank a preference. The bank was put on enquiry by the non-payment of the checks. It made enquiry and made it in the most proper quarters, as to the status and prospects of the debtors, and as to their relations to other creditors, if any. The evidence rebuts the presumption that the bank intended to obtain or supposed it was obtaining a preference over any creditor who had a subsisting enforceable claim at the time, or that the debtors intended to give the bank or suffer it to have any such preference, or that the bank had reasonable cause to believe that the debtors had any such intention or view. When the levies were made, the debtors were going on with their business. They continued it for six weeks afterwards before the petition against them was filed. It does not appear that the levy of the executions broke up their business, or suspended its continuance. Although the firm failed in September, eighteen hundred and seventy, and did not after that pay its debts in full, yet during the interval between that time and the levies, it was making compromises as its debts matured, at the rate of forty-five cents on the dollar, to the satisfaction of those who compromised, and as I understand the evidence, was disposing of its debts as they matured, by such compromises. It does not appear that at the time of the levies the bank had reasonable cause to believe that there were any creditors not compromised with, and over whom it could obtain a preference. What transpired after the levies were made cannot affect the rights of the parties. The question is, as to what the bank had reasonable cause to believe, at the time the levies were made. It results, therefore, that the bill must be dismissed with costs.

A. BLUMENSTIEL, for the plaintiffs. H. E. TREMAIN, for the bank. J. STERLING SMITH, for the sheriff.

November 21, 1871.

CONNECTICUT SUPREME COURT OF ERRORS.

FEBRUARY TERM, 1871.

Where debtor filed his deed of assignment under the insolvent law of Connecticut, and an assignee was appointed to take charge of the property, the supreme court of Connecticut decided that the assignee was entitled to judgment against the deputy sheriff for property seized by virtue of a writ of attachment, holding that the distribution of a debtor's property, under the state insolvent laws, was not a violation of the provisions of the United States bankrupt act.

That when there is a conflict of jurisdiction, the state courts must yield to the United States bankrupt courts, if within the time limited by statute the latter should assert their authority, but should the probate court of the state attempt to grant a certificate of discharge to an insolvent debtor, neither this court nor the courts of other states would give effect to any such certificate.

From the provisions of the thirty-fifth section of the said act, it is manifest that congress intended that the various conveyances therein specified shall be valid unless proceedings in bankruptcy are instituted within six months.

MALTBIE v. *HOTCHKISS.*

CARPENTER, J.—The defendant, a deputy sheriff, attached the property described in the declaration on the twenty-third day of November, eighteen hundred and seventy, by virtue of a writ of attachment against Jewett G. Smith. On the same day Smith lodged with the court of probate a deed of assignment under the insolvent laws of this state. On the thirtieth day of the same month, the plaintiff was approved as assignee and thereupon proceeded with the settlement of the estate. The attaching creditors obtained a judgment against Smith on the ninth day of December following. Smith's indebtedness exceeded four thousand dollars, but no proceedings in bankruptcy have been instituted. The plaintiff claims the property as assignee, and the defendant claims it as deputy sheriff, by virtue of said attachment.

The defendant's claim is that the bankrupt act of the United States repealed, *in toto*, the insolvent law of this state, so that it could not operate to dissolve the attachment.

This is not a new question in this court. In Hawkins' Appeal, 34 Conn. 548, we held that a voluntary assignment by a debtor, under the insolvent laws of this state, no pro-

ceedings having been instituted under the bankrupt act, was not void, although the United States bankrupt act was in existence and applicable to the case at the time of the assignment. We see no good reason for overruling that decision and establishing a different doctrine. On the other hand we think there are good reasons why we should not do so.

Since that decision was promulgated, a large number of insolvent estates in this state have been settled in the state courts; under that decision, titles and other rights and interests have been acquired, and it is believed that the evil consequences which would follow a contrary decision now, would far exceed any evils existing under the present state of things. So far as we know, there has been no conflict between the federal and state jurisdiction, and there need be none. The view we take of this interesting question does not in the least interfere with the course of proceeding in the United States courts. If any insolvent debtor, or any creditor of such, desires that the estate shall be settled in that court, it can be done. If all the parties concerned desire that it shall be settled in the state courts, as yet we see no good reason why that may not be done.

Should a case arise in which there will be an actual conflict of jurisdiction, the state must yield to the national. Even in this case should the bankrupt court, within the time limited, assert its jurisdiction, proceedings in our own courts would be thereby superseded.

Should the probate court attempt to grant a certificate of discharge to an insolvent debtor under the state law, neither our own courts nor the courts of other states would give effect to any such certificate.

Discharges heretofore granted by the state courts, when no national bankrupt act has been in existence, have given rise to much litigation, and it has been a grave question to what extent such discharges are operative outside the limits of the jurisdiction which granted them. Debtors so discharged have oftentimes been perplexed and embarrassed in their business enterprises, owing to the doubt and uncertainty

as to the effect of such discharges in other states. Hence the demand for a uniform system of bankruptcy. Hence the power conferred upon congress to establish such a system. In this respect we make a national institution between discharging the debtor and distributing his assets among his creditors.

The bankrupt act was demanded and passed mainly for the former. The latter is in its nature incidental to the former, which is the principal thing. There probably existed in every state, at the time of the passage of the bankrupt act, some statutory provisions for the distribution of the effects of insolvent debtors among their creditors.

We are not aware that any complaint was made of the insufficiency of those statutes, or of any hardship in their practical operation that is not inherent in this kind of litigation. No demand for a bankrupt act was made upon any such ground, and we can hardly believe that congress intended to repeal or suspend those state laws, except so far as was necessary for the accomplishments of the main object in view, and that necessity, as it seems to us, may well be limited to those cases over which the courts of the United States actually assert their jurisdiction within the time limited for that purpose.

The act of congress does not, in express terms, repeal the state laws. A repeal by implication arising from the force and effect of the constitution of the United States, and from the supremacy of the laws of congress passed in pursuance thereof, must be limited by the terms and provisions of the act from which the implication is derived.

It cannot be doubted that congress has power to prescribe the cases to which the bankrupt act shall and shall not apply, to declare the consequences which shall and which shall not be affected thereby, and also to declare the extent of its operation to defeat or repeal state laws relating to the same subject matter. Therefore assuming that congress has jurisdiction, and, if exercised, exclusive jurisdiction over the whole matter of distributing the effects of an insolvent

debtor among his creditors, a proposition which we by no means admit—the intention of congress, as ascertained from the bankrupt act itself, must be our guide. And that brings us to consider some provisions in the bankrupt act which have not been adverted to in the discussion upon this question before this court.

In the thirty-fifth section it is provided that "if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defeat the object of, or in any way impair, hinder, impede or delay the operations and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

There can be no doubt that the deed of assignment in this case comes strictly within this provision of this act.

The assignor contemplated insolvency and acted with a view to a *pro rata* distribution among his creditors, and the assignee so understood it. It was *prima facie* an act of bankruptcy, made so expressly by the last sentence quoted above. Now a conveyance like this, if made within six months before the filing of the petition by or against the assignor, is expressly declared void. If more than six months elapse after the conveyance and before the filing of the petition, the conveyance, by necessary implication, is unaffected by the bankrupt act. If originally valid, it

remains valid still, From this provision it seems manifest that congress intended that the bankrupt act should leave all such conveyances as it found them, unless proceedings in bankruptcy were instituted within six months. There is some analogy in respect to the question now under consideration between this provision and that relating to attachments. The same sections, together with section fourteen, makes void all attachments made within four months next before the filing of the petition, leaving all attachments made before that time in full force. An attachment is a sequestration of the debtor's property to pay a single debt. An assignment in insolvency is a sequestration of all his property to pay all his creditors *pro rata*. The one may work a preference, the other *cannot*. If either is to be favored in an act having for one of its objects an equal distribution among creditors, the latter certainly is entitled to that preference. In respect to the proper construction of the former there is no doubt. Why should there be in respect to the latter?

The language of the act in relation to the two classes of cases is similar. The principal difference has reference to time, being four months in the one case and six in the other. But the difference in time is immaterial. The substance in both cases is the same, and the construction should be the same.

That part of the act which relates to involuntary bankruptcy seems to throw some light also on the question. By the thirty-ninth section it is provided, among other things, that any person who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property &c., with intent, by such disposition of his property, to defeat or delay the operation of this act, * * * shall be deemed to have committed an act of bankruptcy, and, *subject to the conditions hereinafter prescribed*, shall be adjudged a bankrupt on the petition of one or more of his creditors, &c., *provided such petition is brought within six months after the act of bankruptcy shall have been committed.*

And if such person shall be adjudged a bankrupt, the assignee may recover back the property conveyed, &c. The assignment under which the plaintiff here claims, is an *act of bankruptcy by virtue of this section, but only* unless proceedings are taken in the United States courts within six months; and by the thirty-fifth section the assignment is made *void only*, if made within six months before the filing of the petition in bankruptcy. It is not claimed that the bankrupt act, by express terms, makes the conveyance in this case *void;* it is only claimed that it does so by necessary implication. But we think that the implication from the sections of the act above referred to is clear and decided the other way; and that congress intended that this and all similar conveyances should be good unless attacked under the bankrupt act within six months.

There is another aspect of this case worthy of notice. The defendant claims the property by virtue of an attachment in favor of a creditor. If his claim is sustained the attaching creditor appropriates to himself the property to the exclusion of the others. It would be strange indeed if these two laws, each intending and providing that the debtor's property shall be equally distributed among all his creditors, should be so interpreted, in any case, as to defeat that object and work a practical preference. But we lay no special stress upon this circumstance.

We prefer that the decision should rest upon broader grounds.

For these reasons we advise the court of common pleas to render judgment for the plaintiff.

LOUIS H. BRISTOL, ESQ. for plaintiff. JOHNSON T. PLATT, ESQ. for defendant.

UNITED STATES DISTRICT COURT—W. D. PENNSYLVANIA.

A provisional assignee should not be appointed unless the court is satisfied that it is necessary for the protection of the property, and that it will enure to the benefit of all the creditors.

The removal of a debtor's goods in fulfillment of an existing contract made long before the commencement of bankruptcy proceedings, is not fraudulent within the meaning of the bankrupt act, and not sufficient grounds for the appointment of a provisional assignee.

M. & M. NATIONAL BANK OF PITTSBURGH v. *THE BRADY'S BEND IRON CO.*

McCandless, J.—The M. & M. National Bank of Pittsburgh present their petition to this court, praying that the Brady's Bend Iron Co. may be declared bankrupts. To this an answer has been filed denying the acts of bankruptcy charged, and demanding a trial by jury, which has been ordered.

They also allege that the company is removing its goods and chattels, the produce of its works, from its place of business at Brady's Bend; that such disposition of its property is fraudulent, and intended to defeat the provisions of the bankrupt law; and they pray the court to issue their warrant to the marshal, commanding him to take possession, provisionally, of all the property of the company. To this a sworn denial has been filed, and assigning grave reasons why the prayer of the petition should not be granted.

The exercise of this power—appointing a provisional assignee—is one of great delicacy, and should not be called into action unless the court is satisfied that it is necessary for the protection of the property, and that it will enure to the benefit of the creditors. It is discretionary, but it is a legal discretion, to be used with the best lights before us. We must be satisfied that the disposition of the property is fraudulent, with the design to remove the same to the prejudice of the general creditors, and to defeat the provisions of the bankrupt law.

It is not charged, in the adversary petition, that the stop-

page of payment of the commercial paper was fraudulent; but in the application for the appointment of a provisional assignee, the removal of the railroad iron, in fulfillment of a contract long since made, is declared to be so. Fraudulently means knowingly and without just excuse, as applicable to the paper itself. If a man or a corporation declines to pay, because he is not liable to pay, or because he has a valid claim against the paper, or a set off, that is not a stoppage or suspension within the bankrupt law. 3 N. B. R. 83; Bump, 500.

Take the case of a forgery. An honest defence to the particular paper unpaid would take the case out of the statute. If this be so, how can the removal of the goods of the debtor in the performance of an existing contract be deemed fraudulent. It is but the exercise of the legitimate functions of the corporation in carrying on their business, and for all the goods shipped they receive an equivalent in bills of exchange or money, which is for the benefit of all the creditors. To appoint a provisional assignee, pending the issue to be tried by a jury, would be to arrest the operation of the machinery, stop these extensive and valuable works, and throw hundreds of workmen out of employment. For we cannot order the marshal to do more than to take possesion of and guard the property of the corporation until the trial by jury is had, or until the further order of the court. This would be ruinous to both debtor and creditor, and would impair the security which the latter has for the payment of his debt.

It is proper to add, that since the argument I have conferred with my brother McKennan, and we concur in the principles upon which this case should be decided.

The rule is discharged, and the appointment of a provisional assignee is refused.

This, with other cases involving the same principles, was argued by Mr. C. B. M. SMITH, Mr. VEECH and Mr. DAVID WATSON for the creditors, and by Mr. GOLDEN for the respondents.

UNITED STATES DISTRICT COURT—CALIFORNIA.

A bankrupt applied to the court in bankruptcy for an order to the assignee, requiring him to set apart certain real estate as his homestead, and for an injunction restraining a creditor who had recovered a judgment and issued an execution thereon prior to the bankruptcy, from proceeding to sell the property.

The application was denied for the reasons that if the property in question be a homestead, the title is unaffected by the bankrupt act. If it is not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has been wrongfully seized in execution, the bankrupt has the same rights before the state tribunals as any other person whom it is sought to deprive of a lawful homestead

In re C. HUNT.

HOFFMAN, J.—This was an application by the bankrupt for an order to the assignee requiring him to set apart certain real estate as the homestead of the bankrupt, and for an injunction restraining a creditor who had recovered a judgment against the bankrupt, and issued an execution thereon prior to the bankruptcy, from proceeding to sell the property.

The register has reported that in his opinion the property in question has been duly declared a homestead and is exempt from forced sale.

In this opinion I am inclined to concur, but I see no reason for making the order and issuing the injunction prayed for. If the property be the legally declared homestead of the bankrupt, no title to it passed to the assignee, and it was wholly unaffected by the assignment. The setting it apart by the assignee could therefore convey no additional title. It would only amount, when approved by the court, to a declaration that this court, as a court of bankruptcy, has no concern with it.

The provisions of general orders in bankruptcy, No. XIX, requiring the assignee to report to the court the "articles set off to the bankrupt under the fourteenth section of the act, with the estimated value of each article," evidently refer to the "necessary household and kitchen furniture and other articles and necessaries not exceeding $500 in value," which the assignee is, by that section, required to "designate and

set apart," and not to real estate held as a homestead, the title to which, as the act expressly declares, does not pass to the assignee and is not "impaired or affected by any of the provisions of the act."

Undoubtedly if the assignee were proceeding to sell or to treat as assets property exempted from forced sale, the court, on the application of the bankrupt would restrain him. But in this case the assignee makes no such attempt, nor has he any interest in the question; for the property, if not a homestead, is subject to the judgment lien of a creditor for an amount which would absorb its proceeds The real contest is between the bankrupt and the judgment creditor, and the application is an attempt to procure from the bankruptcy court a decision of a question which properly belongs to the tribunals of the state, under whose laws the homestead rights were acquired.

I think it clear that no such use can or ought to be made of this court. A homestead is not a "necessary article" to be set off by the assignee.

The provisions of the nineteenth rule are therefore inapplicable. The assignee makes his claim to the property and if it be a homestead, the title to it is unaffected by the bankrupt act.

If it be not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has wrongfully been seized in execution, the bankrupt has the same rights before the state tribunals as any person whom it is sought to deprive of a lawful homestead.

The application is, therefore, refused, and the temporary injunction dissolved.—September 30, 1871.

[END OF VOLUME V.]

INDEX.

ABSENCE.

The fortieth section of the bankrupt act does not intend that if the debtor "cannot be found" within the district where the proceedings ard pending, or have been commenced, that the marshal as messenger, even if cognizant of the whereabouts of the debtor without the district, shall then prove absence to effect service. Such service is invalid, and if adjudication of bankruptcy is taken by default on a defective petition and the proof does not show any act of bankruptcy, and the same is defective, the adjudication will be reversed, and the property of the bankrupt, if in the hands of officers, applied by the court to have custody of the same, will be relinquished, and the petitioning creditor adjudged to pay the costs of the entire proceedings.—*Alabama & Chattanooga R. R. Co.* v. *Jones*, 97.

ADJUDICATION.

A firm may be declared bankrupts, although one of its members may have already been adjudicated on a creditor's petition. Where it is proved that the bankrupt has been imprisoned but seven days exclusive of the first day, this of itself is not sufficient to support an adjudication of bankruptcy.—*Hunt, Tillinghast & Co* v. *Pooke & Steere*, 161.

See CORPORATION. DISMISSAL OF APPEAL, DISMISSAL OF PETITION, PARTNERSHIP, PETITION.

AGREEMENT.—SEE INJUNCTION.

AMENDMENT.

A register has a right to allow amendments to the schedules on the *ex parte* application of the bankrupt, at any time while the cause is pending before him, but it is the better practice, if there shall have been an appearance on the part of creditors, to issue an order to show cause, &c., and to require due notice of such application to be given.—*In re* Heller, 46.

It is the duty of the bankrupt to amend his schedules so as to make them

conform to the facts, and that the filing of specifications does not deprive him of that right or release him from that duty.—*Id.*

The register should allow all necessary and proper amendments whenever a proper cause therefor is shown.—*Id.*

When a bankrupt amends his schedule after an assignee has been chosen, so as to include an additional creditor for a considerable amount, it is not necessary to notify the creditors already named in such schedules before the amendment can take place, or to call a new meeting of creditors.—*In re* Carson, 290.

If the creditor, after proving his claim, wishes to have the assignee already appointed removed, he can petition to the court in accordance with form number forty.—*Id.*

APPEAL.

Where a decree is entered in the district court in favor of complainant, and respondent files notice of appeal giving requisite bond, and citation issues within ten days, but the transmiss upon appeal not having been filed in the circuit court until May, eighteen hundred and seventy-one, after two terms had gone over, on motion to dismiss appeal because transmiss had not been filed at next term after the appeal, *Held*, Motion denied because time to dismiss appeal had been enlarged by agreement of counsel, which is permissable, and therefore this case does not come within decision *in re* Alexander, 3 N. B. R. 6.—*Baldwin* v. *Rapplee*, 19.

Where there has been a joint decree against two parties, and one alone asks for an appeal, the appeal will be dismissed unless it appears by the record that the other party had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join.—*Masterson* v. *Howard et al.* 130.

When a complaint is defective in form, but not in substance, such defect can only be reached by demurrer, on the ground that the complaint is unintelligible or uncertain.—*Merritt* v. *Glidden et al.* 157.

The filing in the appellate court of an adjudication of the bankruptcy of the defendant, rendered by the register of the United States district court, after the appeal is taken, will not have the effect to stay the proceeding on the appeal.—*Id.*

A judgment of the court below, from which an appeal is pending, is a final judgment, in contemplation of section twenty-one of the United States bankrupt act of eighteen hundred and sixty-seven.—*Id.*

Where a party appeals from the decision of the United States circuit court to the United States supreme court, the allowance of the appeal is to relate back to the time when the original application was made for an appeal to the judge of the circuit court, and entitles a party to a stay of proceedings. Decreed that all orders in the case made by the circuit or district courts since the date of the injunction granted by the circuit judge, be vacated and annulled, and it is ordered that all things be restored to the condition in which they stood at the date of said injunction.—*Thornhill et al. and Williams* v. *Bank of Louisiana*, 377.

See EQUITY.

ASSIGNEE.

An assignee in bankruptcy of one of two joint makers of a note secured by a mortgage, cannot maintain a petition to declare the security void for usury.—*Brombey* v. *Smith et al.* 152.

The bankrupt act does not grant to the assignee of a bankrupt any right or power to institute proceedings for the recovery of a statute forfeited and claimed by the bankrupt either prior or subsequent to proceedings against him in bankruptcy.—*Id.*

An assignee, through the court, may require the creditor to prove his debt in the usual form, reciting the security and setting forth the consideration. and may contest the claim for any usurious surplus.—*Id.*

An additional assignee may be appointed to act in conjunction with the one previously appointed, upon a petition to the court showing sufficient reasons for so doing.—*In re* Overton, 366.

An application to contest a claim against bankrupt's estate will be allowed upon a petition and affidavits stating fully and in detail the grounds upon which such application is based.—*Id.*

A petition for the removal of an assignee was filed, charging collusion with his brother, incompetency, and involving the estate in unnecessary litigation. The court held that there was a failure to prove the first two charges, and in regard to the third, if he had erred through erroneous legal advice, it may be cause for ordering him to employ other counsel, but not necessarily for his removal. Prayer of petitioner denied. Costs ordered to be paid out of bankrupt's estate.—*In re* Blodget & Sanford, 472.

A provisional assignee should not be appointed unless the court is satisfied that it is necessary for the protection of the property, and that it will enure to the benefit of all the creditors.—*M. & M. National Bank* v. *Brady's Bend Iron Co.*, 491.

The removal of a debtor's goods in fulfillment of an existing contract made long before the commencement of bankruptcy proceedings, is not fraudulent within the meaning of the bankrupt act, and not sufficient grounds for the appointment of a provisional assignee.—*Id.*

See CORPORATION, JURISDICTION, PARTNERSHIP, PREFERENCE, PROOF OF DEBT, PURCHASE OF CLAIMS, SUFFERING PROPERTY TO BE TAKEN, WIDOW.

ASSIGNMENT.—See FEIGN SOLE.

ATTORNEY.

Upon the hearing of the petition for review on behalf of a corporation, the authority of its counsel was denied. The professional statement of counsel as to their authority must be taken as conclusive evidence of the fact asserted unless proof to the contrary is made. No such proof being offered, their appearance is allowed. Objection was also raised to the service of the petition of review upon the attorneys for the petitioner in the preceding proceedings, for the reason that upon the adjudication of the corporation their relation of attorney ceased as to petitioning creditors. The service on the attorneys being sufficient, because reasonable notice to.

counsel is sufficient, and they are still the counsel for petitioning creditor, as bankruptcy proceedings are a single statutory case from the filing of the petition to the discharge of the bankrupt. And appearance cures defective service. The power of review is conferred by the bankrupt act on the circuit court in term time, or circuit judge in vacation.—*Alabama & Chattanooga R. R. Co.* v. *Jones*, 97.

See COUNSEL FEES.

BANK.

Where a bank went into liquidation in accordance with the provisions of a state law in eighteen hundred and sixty-eight, pursuant to the decree forfeiting its charter, and commissioners were appointed to administer the affairs of the bank, and they accepted the trust, giving the necessary bonds, which trust they continued to fulfill for a year, when an involuntary petition for the adjudication of the bank and the commissioners bankrupt, was filed in the United States district court of the district, alleging fraudulent preferences in payments by the commissioners, and also praying that a provisional warrant might issue to take possession of the assets of the bank then in the hands of the commissioners. A decree in bankruptcy was made, and injunctions granted against the commissioners. The commissioners, within ten days of the decree, filed a petition for the review by the circuit court of the decree and order of the district court, and the circuit court affirmed the decree, &c., of the district court.—*Morgan et al.* v. *Thornhill et al.* 1.

A banker has no lien upon the moneys of a depositor for any separate debt which the depositor may be owing him, hence, any amount on deposit, in the name of the bankrupt, must go in as assets, and the banker must prove his debt and take his dividends with the other creditors.—*In re* Warner *et al.* 414.

When a banker, in accordance with his usual custom, charges his depositor in his deposit account, for the notes or other obligations as they fall due, the transaction is valid only as between the banker and the depositor, but in the event of the depositor becoming bankrupt it might constitute an unlawful preference under said act.—*Id.*

A petition to review and reverse an adjudication of bankruptcy was filed in the United States circuit court by commissioners appointed under state law, for the purpose of liquidating the affairs of the bank. The defendants to the petition of review except, on the ground that the commissioners are not the legal representatives of the bank. The court decided that the petition of review must be dismissed at the costs of the commissioners, and that the judgment whereby the bank was adjudged bankrupt be affirmed, and that the injunction heretofore granted be rescinded and revoked.—*Thornhill et al. and Williams* v. *Bank of Louisiana*, 367.

BANKRUPT.

EXAMINATION OF. It is no sufficient excuse for not answering a question put to the bankrupt that he has already replied to it at a former examination

held at the instance of some other creditor or the assignee.—*In re* Vogel, 393.

BANKRUPT ACT, 1841.

The bankrupt law of eighteen hundred and forty-one, and the Massachusetts insolvent law and decisions commented upon.—*Hall* v. *Wager & Fales*, 182.

The act of eighteen hundred and forty-one declares void preferences made by a party *contemplating* bankruptcy; the act of eighteen hundred and sixty-seven includes those made by a party *being insolvent*, and the decisions under the former act are not always applicable to the present statute.—*Id.*

COMMISSION MERCHANT.

A commission merchant acts in a fiduciary character and the trust attaches to the goods consigned to him for sale on commission within the meaning of section thirty-three of the United States bankrupt act of eighteen hundred and sixty-seven.—*Lenke* v. *Booth*, 351.

CONDITIONAL DELIVERY.

A contract for the conditional delivery of goods to a debtor gives his creditors no title to them until the account for the same is paid.—*Sawyer et al.* v. *Turpin et al.* 339.

CONFESSION OF JUDGMENT.

Where a creditor who has been carrying and renewing a note, enters up judgment by virtue of a warrant of attorney attached, and issues execution, the debtor having three days before absconded, leaving his property and creditors unprotected, the business community and newspapers being in speculation as to his departure and means, and the creditor having come to the conclusion that "there was something wrong," and that his interests as well as those of the surety on the note require that judgment should be entered, he obtains such preference as is avoided by the thirty-fifth and thirty-ninth sections of the bankrupt act.—*Golson et al.* v. *Neihoff et al.* 56.

The preference upon a judgment note is not obtained when the warrant of attorney is given, but when the judgment upon it is entered.—*Id.*

It is not a sufficient answer to say that the warrant of attorney was given to secure a *bona fide* debt, and that at the time the creditor had no knowledge of his debtor's insolvency. The question depends upon the knowledge or information which the creditor had at the time he made his warrant operative.—*Id.*

See EXECUTION.

CORPORATION.

A railroad company created by the laws of Alabama, called "The Alabama & Chattanooga Rail Road Company," and a corporation of the same name and with the same board of directors and the same officers, chartered by each of the states of Georgia, Tennessee and Mississippi, which four states the railroad traverses, was on the eighth day of June, eighteen hundred

and seventy-one, adjudged bankrupt by the United States district court of Alabama. Notwithstanding the fact that the company had no principal office in the state of Alabama, neither do its president, directors or superintendent keep an office within that state, nor have either of them been "*found*" within the middle district of Alabama, where the proceedings were commenced. The order to show cause directed to be served on said corporation, in the proceedings upon which the adjudication of bankruptcy was made, was served upon an officer of the company at its principal office in Chattanooga, Tenn. The order of adjudication was granted, because of the default made by the company on the return day of the order to show cause. Temporary custodians were thereupon appointed, authorized and directed to take possession of the company's property, and acted upon this authority.—*Alabama & Chattanooga R. R. Co.* v. *Jones*, 97.

A corporation carrying on and pursuing any lawful business defined and clothed by its charter with power to do so, is clearly a business corporation, and amenable to the provisions of the bankrupt act; therefore the objection to the adjudication of a railroad company, because it is not a monied business, a commercial corporation, or a joint stock company is not well taken. For it seems to be the clear intent of the thirty-seventh section to bring within the scope of the bankrupt act all corporations, except those organized for religious, charitable, literary, educational, municipal or political purposes.—*Id.*

When the bankruptcy proceedings are based on the ninth clause of the thirty-ninth section of the bankrupt act of eighteen hundred and sixty-seven, as amended, it is necessary to aver and prove that the debtor was either a banker, broker, merchant, manufacturer, miner or trader, and as the charter of the Alabama & Chattanooga Railroad Company does not authorize it to carry on either of these pursuits, it does not come within the provisions of the ninth clause of section thirty-nine, as amended. As the petition upon which the adjudication of this railroad company was made did not allege that it was either a banker, broker, merchant, manufacturer, miner or trader, and as no proof thereof was offered to this effect, the irresistable conclusion is, that upon that petition and the proofs presented to the court, this railroad company should not have been adjudicated a bankrupt.—*Id.*

Where a corporation, holding property and carrying on business in three several states, is adjudicated bankrupt and assignees are appointed who are respectively citizens of two states in which proceedings in bankruptcy are pending, but none is appointed in the third state in which proceedings in bankruptcy are also pending, *Held*, that as three assignees were to be chosen, and proceedings were pending in three different districts, it ought to have been so arranged that each of the districts could have an assignee within it a resident thereof. The court in the district in which no assignee has been selected, therefore declines to approve of the election of the assignee.—*In re* Boston, Hartford & Erie R. R. Co. 233.

The stockholders of a trading corporation agreed to lend money to the company in proportion to their several shares. One of them made the loan by giving his note, which the company endorsed and agreed with him to provide for at maturity. They failed to take up the note when it became

due, and the promissor paid it within fourteen days after its maturity. *Held*, That there had been no suspension of the commercial paper of the company for fourteen days.—*In re* Massachusetts Brick Co. 408.

Where stockholders were to advance money to the company in proportion to their interests, and did so advance it for some months, and all but one of them afterwards extended their loans for one year, in accordance with what the treasurer testified was an understanding at the time the loans were made, and the company paid all its trade debts as they matured, and were in good credit, whether the company could be properly considered insolvent, *quere*. At a meeting of the stockholders, who were also the principal creditors of the company, it was voted unanimously to give a mortgage to one of the stockholders for the excess of his previous advances above his proportion. The petitioner, who was a stockholder and creditor, was present and made no objection. *Held*, He was estopped to set up the mortgage as an act of bankruptcy by the corporation.—*Id.*

COSTS.

A debt or principal must be proven or allowed before the costs made prior to the commencement of proceedings in bankruptcy can be proven and allowed. Costs are but incident; if there is no principal or debt there can be no incident. Where the original debt has been proved and allowed, attachment costs can be proved as a general debt against the estate of the bankrupt if made in good faith before the commencement of proceedings in bankruptcy without a knowledge of the insolvency of the party, and with no intention to defeat the operations of the bankrupt act. Costs incurred after the commencement of bankruptcy proceedings, also costs for attaching and keeping the exempt property, disallowed.—*In re* Preston, 293.

See JURISDICTION.

COUNSEL FEES.

Where a counsel for petitioning creditors obtains an adjudication, and performs other services incident to the bankruptcy proceedings, but it does not appear that he has in any way recovered property fraudulently conveyed to or possessed of by creditors, and the assets of the estate amount to about the sum of fifteen thousand dollars, an allowance of one thousand dollars made to the counsel for petitioning creditors, by the register before whom proceedings are pending, is too extravagant, and will not be confirmed unless assented to by the assignee, the bankrupts and all the creditors who have proved their debts.—*In re* Sanger & Scott, 54.

A debtor has the right to appear and defend himself against a petition in bankruptcy; hence, although unsuccessful in his defence, the court has the power to allow him such expenses as may be just and proper, including attorney's fees, to be paid from the assets in the hands of the assignee.—*In re* Comstock and Young, 191.

An attorney is also entitled to be paid, out of the same fund, for services rendered to the bankrupt in securing the allowance of exemptions which were rejected by the assignee.—*Id.*

Where the register is called on to certify as to what sum he deems right to be paid to the counsel for the assignee, and signifies three hundred and fifty dollars as the utmost limit, but certifies the question to the court for its opinion because counsel feels aggrieved at the inadequateness of the sum, the ruling of the register was sustained.—*In re* J. & S. Warshing, 350.

See JURISDICTION.

DEMURRER.

A demurrer to a bill in equity brought by the assignee, on the ground that complainant had a complete remedy at law, will be overruled where the facts show that questions of fraud, trust and partnership are all involved in the case at issue.—*Taylor* v. *Rasch & Bernart*, 399.

DENIAL OF BANKRUPTCY.—See JURISDICTION.

DEPOSITION.

Although a register may have no authority to take a particular deposition, he has full authority to administer oaths, and when by the assent of parties he has taken such a deposition to be used in evidence in a cause, the same becomes a sworn statement made in the case to be used as evidence therein, to which the party causing the deposition to be so taken cannot object.—*Lawrence* v. *Graves*, 279.

DIFFERENT DISTRICTS.

Where one member of a firm files his petition in one state and requests his copartners to join him in the proceedings, which they refuse to do, but subsequently appear by attorney and consent to an adjudication, whereupon all the members of the firm are adjudicated bankrupt, and upon the application for the discharge of the bankrupts, specifications were filed in opposition to their discharge on the ground of a want of jurisdiction, *Held*, That section thirty-six, taken in connection with section eleven, supplemented by General Order XVIII. should be construed together. Section thirty-six provides that "if such copartners (that is copartners in trade, who are sought to be adjudged bankrupts on the petition of themselves or any one of them of any creditor of theirs) reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case." The court which first obtains jurisdiction over the subject matter of the petition, and over the person of the petitioner, shall have exclusive jurisdiction over the case: that is, over the subject matter of the petition, and over all the copartners if the non-petitioning copartners be brought in by appropriate process. Objections to jurisdiction overruled.—*In re* Penn *et al.* 30.

DISMISSAL OF PETITION.

A. was adjudicated a bankrupt on the petition of creditors. Sometime thereafter the brother of the bankrupt filed his petition, alleging that the

bankrupt died before the adjudication; that the petitioner had been served with an injunction restraining him from interfering with, or disposing of the property of the said bankrupt. This petition was answered by alleging, among other things, that the bankrupt had absconded and that the petitioner and others had undertaken to conceal the property from creditors, and demanding proof of death. The court decided that the petition must be dismissed. That there was no party to a creditor's petition except the petitioning creditor and the bankrupt; that the service of an injunction on any person or any number of persons, did not make them parties to the proceedings, although any one served might, by petition or on motion, have a wrongful injunction dissolved; this, however, did not give him the right to contest or vacate the adjudication, that being a matter in which he could have no interest.—*Karr* v. *Whittaker et al.* 123.

A motion on the part of a creditor who is not a party to the petition, that the proceedings on the petitions for adjudication be dismissed, must be denied on the ground that the denials of bankruptcy by debtors are questions solely between the petitioning creditors and the debtors, with which no outside party, sustaining merely the relation of a person who claims to be a creditor of the debtors, can be permitted to interfere.—*In re* Boston, Hartford & Erie R. R. Co. 232.

The decease of one partner prior to any adjudication upon the question of bankruptcy, is not legal cause for dismissing the petition. If neither the petition nor the deposition of the act of bankruptcy are signed by the petitioner, the defect is fatal.—*Hunt, Tillinghast & Co.* v. *Pooke & Steere*, 161.

DISCHARGE.

A creditor who does not appear upon the return day of the order to show cause why discharge should not be granted, has no standing in court and cannot subsequently file specifications against bankrupt's discharge.—*In re* Smith & Bickford, 20.

An involuntary bankrupt who has complied with all the provisions of the bankrupt act, can apply for and receive a discharge the same as a voluntary bankrupt. The thirty-third section of the bankrupt act, as amended July twenty-seventh, eighteen hundred and sixty-eight, and July fourteenth, eighteen hundred and seventy, is applicable to proceedings in involuntary bankruptcy. An insolvent, although having assets, and those assets having been duly surrendered to the assignee, but not amounting to the required fifty per cent. of the claims proven against his estate, is not entitled to a certificate of conformity, unless the bankrupt, before, on, or at the time of hearing of the application for discharge, tender or file the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims as required by section thirty-three of the bankrupt act as amended. In case an involuntary bankrupt does not tender or file the assent of his creditors or show payment of his debts by the return of the assignee, or that his property and effects equal, or will pay fifty per cent. so as to comply with the requirements of section thirty-three of the bank-

rupt act as amended, the certificate of conformity cannot be granted.—*In re* Bunster, 82.

Bankrupt filed a petition for his discharge more than one year after adjudication, setting forth in said petition that no debts had been proved, and no estate had come into the hands of the assignee for distribution. No debts in the case had been proved, and assets to the amount of ten dollars and eighty cents had come into the hands of the assignee. *Held*, That bankrupt should have filed his petition for discharge within one year after adjudication, and failing to do so, discharge must be refused.—*In re* Schenck, 93.

A discharge will be refused for want of jurisdiction where the testimony shows that the bankrupt did not reside or carry on business, within the meaning of the act, in the district where the petition was filed for the six months next immediately preceding the time of filing, or for the longest period during such six months, although he removed to that district more than a month before the commencement of proceedings.—*In re* Leighton, 95.

Examination of Bankrupt.—On filing the specifications in opposition to a bankrupt's discharge, the hearing upon the petition is at once transferred into court by section four of the bankrupt act; therefore there cannot be any examination of the bankrupt by the creditors before a register, on the application by the bankrupt for a discharge. If creditors desire a further examination of the bankrupt before the register, to be used by them in opposing his discharge, they must proceed under section twenty-six of said act.—*In re* S. F. & C. S. Frizelle, 119.

Where an appraisement is exaggerated, although there is no evidence of any depreciation, the proceedings having been commenced after January first, eighteen hundred and sixty-nine, and the debtors not having shown that their assets are or have been at any time since they filed their petition, equal to fifty per cent. of the claims proved against their estate, upon which they are or were liable as principal debtors, and not having filed the assent in writing of a majority in number and value of their creditors, to whom they are or have become liable as principal debtors, and who have proved their claims, discharges are refused.—*In re* Borden & Geary, 128.

When the assets of a bankrupt, after the payment of valid liens, do not equal fifty per cent. of the claims proved against him contracted subsequently to January first, eighteen hundred and sixty-nine, on which he was liable as principal debtor, and he fails or neglects to file the consent of a majority in number and amount of those creditors, he can only be discharged from debts contracted prior to January first, eighteen hundred and sixty-nine.—*In re* Graham, 155.

Where a bankrupt's discharge is opposed on the grounds that he has sworn falsely in the oath to his schedules, has attempted to conceal his property and has transferred certain shares of stock to one of his creditors with intent to give him a preference, a discharge will be granted where the evidence shows that he had no interest in the property in question; that the alleged transfer was made without any collusion or fraud on his part, and that the stock in question was held by a third party, free from any interest of the bankrupt.—*In re* Penn & Culvers, 288.

Where a debtor's liabilities exceed his assets, and he has ceased to meet his

indebtedness as it falls due, a pledge, payment, transfer, assignment or conveyance of any part of his property, absolutely or conditionally, made while in this condition, is an act of bankruptcy, and constitutes sufficient ground, under the twenty-ninth section of the bankrupt act, for refusing him a discharge.—*In re* Warner, *et al.*, 414.

A specification filed in opposition to a bankrupt's discharge will not be stricken out because all the transactions therein alleged as the grounds of opposition occurred long before the passage of the bankrupt act.—*In re* Cretiew, 423.

There is nothing in the language of the twenty-ninth section of said act, which indicates an intention to confine the operations of its provisions to transactions occurring *after* the passage of the act. *In re* Rosenfield, 1 N. B. R. 161, considered and overruled.—*Id.*

See JUDGMENT, PARTNERSHIP, PETITION.

DOWER.—See FRAUDULENT CONVEYANCE, WIDOW.

ENDORSER.

Where the holder of a note receives part of the amount of the same from the endorser, he is entitled to prove for the whole amount against the estate of the bankrupt maker, and holds any surplus he may receive over and above the amount of the note in trust for the endorser. If the creditor omits to prove his debt, thus showing he looks to the endorser alone for payment, the endorser is entitled to come in and prove the note against the bankrupt's estate, and receive dividends upon its whole amount.—*In re* Ellerhorst & Co. 144.

Where a note payable on demand was not presented for payment, and no demand made within four years, a protest at that time could not fix the liability of the endorser, and a claim of this nature cannot be proved against the estate of a bankrupt endorser.—*In re* Crawford, 301.

An endorser of a note who receives none of the proceeds of the same, and whose contingent never becomes an absolute liability, cannot be compelled to pay to the bankrupt's assignee the amount of the note paid by the bankrupt to the holder, and while he, the debtor, was still carrying on business.—*Bean* v. *Laflin*, 333.

See PREFERENCE, PROOF OF DEBT.

EQUITY.

Decrees in equity, in order that they may be re-examined in the United States circuit court, must be final decrees rendered in term time as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or if entered in court are still subject to revision at the final hearing.—*Morgan et al.* v. *Thornhill et al.* 1.

A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law when the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon.—*Post* v. *Corbin*, 12.

ESTOPPEL.—See CORPORATION.

EXAMINATION.—See DISCHARGE.

EXECUTION.

Where there is no dispute as to the validity of judgments under which executions were issued and levy made, the execution creditors are entitled to satisfaction out of the proceeds of the goods levied on by the sheriff, and afterwards seized by the United States Marshal under a warrant in bankruptcy.—*Swope et al.* v. *Arnold*, 148.

Where only one subject of an intended execution can have been in view of the parties to a confessed judgment, a levy made accordingly on that subject and a sale of it by the sheriff, though constituting in form an involuntary transfer, is indirectly a transfer or disposition of the property by the debtor.—*Hood et al.* v. *Karper et al.*, 358.

An intended security which would be ineffectual in the form of a mortgage or bill of sale, cannot be rendered effective through the device of a warrant of attorney given by a trader to a creditor, which enables him at pleasure to stop the debtor's business and prevent other creditors from getting any share of his available assets.—*Id.*

A confession of judgment, if otherwise invalid under the thirty-fifth section of the bankrupt act, cannot be valid for any such reason as, that the power of attorney bore date more than four or six months before any actual mortgage or transfer.—*Id.*

Where an execution must necessarily stop the debtor's business, the execution creditor, as a rule, has reason to believe the debtor insolvent, and in general intends what, if not prevented, would be a fraud on the provisions of the bankrupt law.—*Id.*

EXEMPT PROPERTY.

It is the duty of the bankruptcy court to see that the bankrupt's exempt property is secured to him. Property exempt by the laws of the state of the bankrupt's domicil is also exempt by the fourteenth section of the present bankrupt act.—*In re* Stevens, 298.

The right of creditors to prosecute their attachment suits after the commencement of bankruptcy proceedings is taken away, and all attachments issued within four months are dissolved by the said act. An officer in possession of property, under a writ of attachment, cannot refuse to deliver it until his fees are paid. He must apply to the court to be paid out of any funds that may be in the hands of the assignee belonging to the bankrupt.—*Id.*

Money cannot be set apart to the bankrupt as part of his exempt property, unless such money is the proceeds of specific things which could and ought to be set apart under the head of "other articles and necessaries of the bankrupt."—*In re* Welch, 348.

See WIDOW.

EXPENSES.—See COUNSEL FEES, RECOVERY OF PROPERTY.

FALSE SWEARING.—See DISCHARGE, FRAUDULENT CONVEYANCE.

FEME SOLE.

In May, eighteen hundred and sixty-three, a *feme sole*, being owner in her own right, of a chose in action, marries, and a suit is instituted shortly thereafter to recover from the debtor in the name of the husband and wife. This suit continues pending until eighteen hundred and sixty-eight, when the husband, upon his own petition, was declared a bankrupt, and an assignee was appointed and an assignment executed in the usual form. Thereafter the assignee was, upon his own motion, by order of the court, made a party plaintiff with the wife, and a judgment was recovered in in favor of the plaintiffs. *Held*, That the assignee may proceed to enforce the payment of such judgment by execution, and receive the money when collected—if this be done in the lifetime of the husband and wife—and if collcted by him must distribute the same to creditors as the law directs. The assignee is deprived of no right because the bankrupt has failed to schedule such chose in action, nor by the provisions of the constitution of North Carolina, adopted in eighteen hundred and sixty-eight.—*In re* Boyd, 199.

FEES.—See EXEMPT PROPERTY.

FIFTY PER CENT.—See DISCHARGE.

FOUR MONTHS.—See FRAUDULENT PREFERENCE, INJUNCTION.

FRAUDULENT CONVEYANCE.

Where a bill was filed to recover certain real estate and personal property alleged to have been conveyed and transferred by the bankrupt within four months next before the filing of the petition against him for adjudication of bankruptcy in fraud of the bankrupt act, the bill is based on two alternative theories: (1.) That the transfers were without consideration, and made to hinder, delay and defraud the bankrupt's creditors; or (2.) If there was a consideration it was a previous indebtedness and the transfers were made with a view to give the defendant a preference, he having reasonable cause to believe the bankrupt insolvent, *Held*, Actual possession under the agreement and performance of it, clearly takes the case out of the statute requiring the agreement to be in writing. And as to its vagueness and uncertainty in the particulars specified, the agreement having been executed by the actual making of the conveyance, the court will now look into the agreement only for the purpose of ascertaining whether the consideration for the conveyance was such as a court of equity will sustain as against the creditors of the grantor. Looking into the agreement for that purpose, I find that full and adequate compensation had been made by the defendant under an agreement between him and the bankrupt, made while the latter was amply solvent, and when he had a perfect right as against all the world to make the same, and hence the conveyance of the one hundred and seven acre tract ought to be sustained.—*Post* v. *Corbin*, 12.

As to the personal property, it was objected at the hearing that the assignee

has a complete remedy at law, and therefore cannot recover for the same by bill in equity. This objection comes too late. It was not taken by demurrer nor by way of answer, but was first made at the hearing. A court of equity will not refuse to take jurisdiction of a cause merely on the ground that complainant has a complete remedy at law where, as in this case, the parties have submitted their rights to the jurisdiction of the court without objection, especially where proofs have been taken and a hearing upon the merits has been entered upon. Decreed that defendant account to complainant for all personal property received by him from the bankrupt at any time within four months immediately preceding commencement of bankruptcy proceedings. Decree for plaintiff for land not included in agreement, for payment of the personal property, and for costs, and dismissal of bill as to the Butterfield farm of one hundred and seven acres.—*Id.*

A debtor conveyed his farm to his wife but did not record the deed until seven years after its execution; during this time, however, he appeared as the owner. Being adjudged a bankrupt, his assignee filed a bill to obtain a conveyance of this property to him (the assignee) for the benefit of the creditors. The wife claimed that the money paid for the property was hers, giving this as a reason why she held the conveyance, and denied any intention of hindering or defrauding her husband's creditors. The evidence showed that the husband purchased the farm on a contract made to himself, but that after the first instalment of purchase money was paid, the property was conveyed to the wife. Further payments were made until about half the amount agreed upon was paid.—*Keating* v. *Keefer*, 133.

At the time the conveyance was made to the wife the bankrupt was considerably in debt, which indebtedness constituted a portion of his liabilities in the bankruptcy proceedings. Almost all of the money paid on the farm was from proceeds of property, the title to which at the time of sale was in the bankrupt, which property was partly paid for by the wife with money earned by herself after her marriage. The court decided that if a married woman consents to the purchase of property with her means by her husband and in his own name, she cannot afterwards reclaim the property as against his creditors, whose debts accrued while the property was so held by him. A decree entered declaring the property assets of the bankrupt and subject to be distributed under the act for the payment of his debts.—*Id.*

A debtor sold his farm for much less than it was actually worth to his father-in-law, who, in turn, deeded it back to the wife for a mere nominal consideration. At the time of the transfer debtor was largely indebted, but believed himself to be solvent. The wife repeatedly told her husband these deeds were burned. He so informed his creditors and procured credit of some of those whom he still owed to a considerable amount on the faith of his actual ownership of the farm and his record title. After his insolvency, these deeds were produced and placed on record, thus giving apparent title to the wife. Debtor was adjudged a bankrupt, filed his schedules without including the farm, and in due time received his discharge. In an action brought to set it aside, the referee held that the bankrupt had been guilty of concealment and false swearing, within the

meaning of section twenty-nine of the present United States bankrupt act, and that the discharge should be set aside and annulled.—*In re* Rainsford, 381.

Where husband and wife join in a deed duly acknowledged so as to release the dower, if the deed be avoided in the hands of a fraudulent grantee as having been executed by the bankrupt with intent to hinder, delay and defraud creditors, the assignee in bankruptcy will be entitled to the land divested of the wife's claim to dower, and the husband's right to a homestead.—*Cox* v. *Wilder et al.* 443.

To a bill brought by the assignee in bankruptcy, to vest the title of the fraudulent grantee in himself, that the land may be sold clear of encumbrances, the bankrupt and his wife are proper parties if they claim homestead and dower.—*Id.*

A person about to engage in a new business, may not, with a view thereto and for the purpose of securing his property for the benefit of himself and his family, in the event of losses occurring in such new business, convey such property to his wife, voluntarily, without consideration. Such a conveyance is fraudulent and void as to subsequent creditors.—*Case* v. *Phelps, et al.* 452.

It must be so declared, notwithstanding it be distinctly found that the conveyance was made without any intent to defraud creditors then existing.—*Id.*

FRAUDULENT PREFERENCE.

Where a debtor gave to his creditors several bonds with warrants of attorney to confess judgments, for money lent in good faith, when neither the borrower or lender had reasonable cause to believe that the debtor was insolvent or intended any fraud upon the provisions of the bankrupt act, *Held*, that judgments subsequently entered thereon, within four months of the date of filing petition in bankruptcy, and where both the debtor and the creditors had cause to believe the debtor to be insolvent, and intended a fraud upon the provisions of the act, were fraudulent preferences. *In re* J. B. Wright, 2 N. B. R. 155, considered and overruled.—*In re* Lord, 318.

Creditors petitioned to have debtors adjudged bankrupts. The debt due the creditors had been merged in a judgment which was clearly a fraudulent preference. *Held*, That the debt having been thus merged it was not a provable debt, and a petition founded upon it could not be sustained. In such a case, however, creditors will be allowed to surrender their preference, and upon their doing so, the acts of bankruptcy being confessed, an adjudication will be ordered.—*In re* Hunt and Hornell, 433.

FRAUDULENT AGREEMENT.—See INJUNCTION.

HOMESTEAD.

A bankrupt applied to the court in bankruptcy for an order to the assignee, requiring him to set apart certain real estate as his homestead, and for an injunction restraining a creditor who had recovered a judgment and

issued an execution thereon prior to the bankruptcy, from proceeding to sell the property. The application was denied for the reasons that if the property in question be a homestead, the title is unaffected by the bankrupt act. If it is not a homestead, the creditor who has a lien to its full value is the only person interested to establish the fact. If it has been wrongfully seized in execution, the bankrupt has the same rights before the state tribunals as any other person whom it is sought to deprive of a lawful homestead.—*In re* Hunt, 493.

See FRAUDULENT CONVEYANCE.

HUSBAND AND WIFE.—See FEME SOLE.

INJUNCTION.

The defendant sued the bankrupt to recover a debt, when he knew, or had reasonable cause to believe his debtor was insolvent. Judgment having been rendered upon the default of the debtor, who did not appear or answer to the action, the execution creditor seized the real estate of the debtor which was attached on the writ, and proceeded to complete his levy. After rendition of the judgment, and before the levy was completed, the debtor filed his petition in bankruptcy, and his assignee applied to the bankrupt court for an injunction to restrain the defendant from proceeding with his seizure and sale of the estate of the bankrupt on the execution, the attachment being within four months of the commencement of the proceedings in bankruptcy. *Held*, That the relief prayed for should be granted, and injunction made perpetual. *In re* Black & Secor, 1 N. B. R. 81; *Beattie* v. *Gardner*, 4 N. B. R. 106, approved.—*Haskell* v. *Ingalls*, 205.

An assignee in bankruptcy filed his petition in equity to prevent the consummation of an alleged fraudulent agreement entered into by the bankrupt and his brother-in-law the day before the filing of the petition in bankruptcy. Previous to this an action on book account had been commenced against the bankrupt by his brother-in-law. The court decided that the action was properly brought in the United States district court, and that the agreement in question was fraudulent. Perpetual injunction granted enjoining the brother-in-law to proceed no further in a suit pending in the state court against the bankrupt.—*Samson* v. *Burton et al.* 459.

See HOMESTEAD.

INSOLVENCY.

If, at the time of the entry of judgment, the creditor has knowledge of his debtor's insolvency, or notice of such facts as make it reasonable to believe him insolvent, he is guilty of intending a fraud upon the act. And where he thus executes the dominant power, such entering of judgment is an act of bankruptcy, participated in by the creditor, and all advantages obtained under it are in violation of the law.—*Golson et al.* v. *Neihoff et al.* 56.

The simple fact that a man doing a large business, pays under special circumstances a large discount for a loan is not notice of insolvency to the

creditor, it being shown that at the time similar commercial paper was selling at high rates.—*Id.*

The question whether the debtor knew or did not know of his insolvency is unimportant in determining as to him; and the purpose of the act being to enforce the equal distribution of the estate, every act of an insolvent that tends to defeat that purpose should be construed strictly as against him, and courts should indulge every presumption permissible by the well settled rules of law, to secure the full benefit of this cardinal principle of the law.—*Hall* v. *Wager & Fales*, 182.

The strict definition of insolvency, usually given in commercial centres, should not be applied in country places. A party should be held insolvent only when he fails to meet his debts according to the usages and customs of the place of his business; the rule should be in harmony with the general custom of the place.—*Id.*

A mercantile firm having no property but their stock in trade, are insolvent within any accepted or sound definition of that term as used in the bankrupt act now in force, who, when pressed for a debt admitted to be just, give as a reason that they are unable to pay it, and suffer judgment to be rendered against them. Hence any creditors issuing execution on a judgment so obtained must be held to have had reasonable cause to believe their debtor insolvent, and property so taken will be restored to the assignee.—*Wilson* v. *City Bank of St. Paul*, 270.

A trader is insolvent within the meaning of the thirty-fifth section of the present bankrupt act when he is unable to pay his debts as they mature in the ordinary course of his business, and not merely when his liabilities exceed his assets.—*Sawyer et al.* v. *Turpin et al.* 339.

JOINT LIABILITY.

A joint request made by the individual members of a firm soliciting B. to become a surety of one of them in an administration bond, does not create a liability of the firm. Hence upon the firm being subsequently declared bankrupt, B. has no debt due therefrom, which is recoverable at law.—*Forsyth* v. *Woods*, 78.

JUDGMENT.

A creditor who obtains judgment for his debt after his debtor has been adjudicated a bankrupt, and takes out execution, cannot prove his debt in bankruptcy, and the judgment will not be affected by the certificate of discharge. Such a creditor, therefore, cannot oppose the bankrupt's discharge.—*In re* Gallison *et al.* 353.

Where a creditor prosecutes his suit merely for the purpose of ascertaining the amount due, he should cause that fact to appear of record and the judgment should be modified to correspond with the fact.—*Id.*

Where such a creditor proved his debt and afterwards obtained an unconditional judgment and took out execution, and appeared to oppose the discharge in bankruptcy, no one having moved to expunge his proof, *Held*,

he would be heard against the discharge on filing a stipulation to release his judgment if the discharge should be granted.—*Id.*

See EXECUTION, FRAUDULENT PREFERENCE.

JUDGMENT NOTE.—See CONFESSION OF JUDGMENT, MORTGAGE.

JURISDICTION.

Where a plea in abatement sets up that the writ, issued in an assumpsit by assignee to recover money paid by bankrupt by way of preference, does not show jurisdiction, and that in point of fact there is none because proceedings in bankruptcy are pending in another district, writ does not allege that any bankruptcy proceedings are pending within this district, but it will be presumed that plaintiffs were appointed assignees in the other district, for otherwise they would have taken issue on the plea. *Held*, that jurisdiction is only vested in the courts of the district in which bankruptcy proceedings are pending for the adjustment and collecting of matters arising therefrom, and for such suits as this one. The United States district court of Rhode Island cannot entertain this case because proceedings were begun in the state of Massachusetts.—*Sherman et al.* v. *Bingham et al.* 34.

The United States district court has no jurisdiction over a petition filed by a creditor of the bankrupt, who claims the property by virtue of certain unrecorded mortgages and bills of sale of earlier date than that of a mortgage given to the wife of a bankrupt by a firm of which her husband was a member, to secure the payment of a promissory note given to her by the said firm. The creditor should seek redress and relief by an action at law or suit in equity. A petitioner may have leave of court to convert his petition into a bill in equity, but the answers filed and the testimony taken cannot be used in the prosecution of the suit in its amended form except by consent.—*Barstow* v. *Peckham et al.* 72.

The district court has no jurisdiction of an involuntary case in bankruptcy, unless it appears on the trial that the debtor, at that time, owes debts provable under the act exceeding the sum of three hundred dollars, and is indebted to the petitioning creditors in the amount of two hundred and fifty dollars. This is true even though the debtor, at the time of the filing of the petition, was indebted to exceed those sums. When his indebtedness, by subsequent payments, is reduced below those sums, the court loses jurisdiction. The latter clause of the forty-first section of the act was intended to allow the debtor to disprove all the material allegations of the petition.—*In re* Skelley, 214.

Payments made by the debtor to the petitioning creditors are material facts on the issue in denial of bankruptcy, and the debtor can introduce evidence of such payments without a special traverse of the amount of his indebtedness.—*Id.*

The receipt of such payments by the petitioning creditors to an amount sufficient to reduce this indebtedness below the minimum established by the act, must be considered as a waiver of the alleged act of bankruptcy.—*Id.*

The petitioning creditors cannot add the costs paid and incurred by them to

their debt in order to raise it above the jurisdictional limit. Such costs are not a part of their debt. The debtor must owe them two hundred and fifty dollars or they have no right to make costs. Nor can the creditors add counsel fees to their debt. In this case, the respondent having been guilty at the time of the filing of the petition, was ordered to pay all costs up to the time of filing his denial, except the docket fee.—*Id.*

Section second of the present United States bankrupt act does not preclude a state court from jurisdiction of an action by the assignee on a cause which accrued to the bankrupt. It is within the power of congress in establishing a uniform system of bankruptcy to provide a uniform rule on the subject of the limitations of actions, which rule must of necessity supersede all state legislation on the subject.—*Peiper* v. *Harmer*, 252.

The United States bankrupt act now in force confers jurisdiction in equity upon the district courts in certain cases, and appeals may be taken from the district to the circuit courts in all such cases where the debt or damages claimed amounts to more than five hundred dollars, provided the appellant complies with the conditions specified in the eighth section of the act.—*Scammon* v. *Cole et al.* 257.

A mortgage given to secure the payment of two promissory notes, the consideration of which being pre-existing debts of the bankrupt, for almost all of which the mortgagees were liable either as sureties or endorsers, is void when it appears that it was made within four months next preceding the filing of the petition in bankruptcy, for the express purpose of giving a preference; that the mortgagors were insolvent and the mortgagees had reasonable cause to believe that the mortgagors were insolvent at the time of the execution of the mortgage, and that the conveyance was made in fraud of the provisions of said act.—*Id.*

The circuit courts of the United States have no jurisdiction of a case either at law or in equity, in which a state is plaintiff against its own citizens. The constitution of the United States does not confer such jurisdiction, nor is it conferred by any act of congress. Such jurisdiction is not conferred upon the circuit court in this case by the bankruptcy act of eighteen hundred and sixty-seven, because there are other necessary parties than the assignee in bankruptcy, and without such parties the plaintiff could not sustain his suit in any court.—*State of North Carolina* v. *Trustees of University et al.* 466.

See DIFFERENT DISTRICTS, DISCHARGE, FRAUDULENT CONVEYANCE.

LANDLORD.—See RENT.

LOAN.—See CORPORATION.

MARSHAL.—See EXECUTION.

MECHANIC'S LIEN.

Under the lien act of Oregon, the lien of a mechanic or material man arises from the doing of the work or the furnishing the material and attaches to the building from that time, upon the condition subsequent that the lien

creditor file a notice of his intention to hold such lien within three months from the completion of the building. The notice required to be filed does not *create* the lien, but is necessary to *preserve or continue* it beyond three months after the completion of the building, and, therefore, the commencement of proceedings in bankruptcy between the doing of the work or furnishing of material and the filing of such notice does not impair or affect the lien or the right of the lien creditor to continue it by filing the notice.—*In re* Coulter, 64.

The lien given by the local act to mechanics or material men is not opposed to the terms or policy of the bankrupt act, as it in no way prefers one creditor at the expense of another or diminishes the general assets of the debtor otherwise applicable to the payment of his general creditors.—*Id.*

MONEY.—See EXEMPT PROPERTY.

MORTGAGE.

A petition by a secured creditor for leave to foreclose his mortgage will be dismissed where no notice is shown to the court to have been given to the assignee of such application, and no proof made of the existence of the debt nor the amount.—*In re* S. F. Frizelle, 122.

To render a mortgage void under the thirty-fifth section of the bankrupt act, it is not necessary that the debtor knew or believed himself insolvent. The section treats of insolvency as a condition of fact, not of belief, and with knowledge of which, and its consequences, he is chargeable in law. It follows as a logical sequence, that when a man, insolvent in fact, gives a mortgage to one existing creditor, he does so with a view to give him a preference.—*Hall* v. *Wager & Fales*, 182.

A chattel mortgage void as against creditors under the state law, and under which the mortgagee had taken possession, having at the time reasonable cause to believe his debtor insolvent, is also void as against the assignee in bankruptcy.—*Harvey* v. *Crane*, 218.

A mortgagee of a chattel mortgage loses his lien if he neglects to have it acknowledged and recorded as required by the state statute. Even though possession of the property was taken before commencement of proceedings in bankruptcy, and was in accordance with the provisions of the mortgage, it operates as a preference, and therefore void as against the other creditors, if done within the time limited by the present bankrupt act. The taking possession does not remit this creditor to his rights as of the date of his mortgage.—*Id.*

Where a security by way of mortgage is given more than four months before bankruptcy, a change in the former substance of the deeds made within four months of the bankruptcy, will be protected if no greater value were put into the creditor's hands at that time than he had before.—*Sawyer et al.* v. *Turpin et al.* 339.

A mortgage given when a debtor was insolvent and when his creditor had reasonable cause to believe him to be so, is void if made within four

months of the filing of a petition in bankruptcy; hence money received from the sale of the mortgaged premises must be accounted for to the assignee.—*Id.*

See EXECUTION, REASONABLE CAUSE, JURISDICTION.

NOTE.—See ENDORSER, PROOF OF DEBT.

ORDINARY COURSE OF BUSINESS.—See INSOLVENCY.

PARTNERSHIP.

A petition was filed by a creditor of the late firm of S. & Co., charging an act of bankruptcy by S. as surviving partner, and praying that he be adjudged a bankrupt, as an individual and as such surviving partner. To this petition objections in the nature of a demurrer were interposed, on the ground that the court has no authority to administer upon the joint estate, unless the firm be declared bankrupt, and that this cannot be done because it has been dissolved by the death of one of its partners, and because it is admitted that the estate of the deceased partner is amply sufficient to satisfy all his debts, both individual and joint. Further, that a bankrupt cannot be discharged from partnership debts, unless the other partners are brought in and the firm adjudged bankrupt, and that inasmuch as the alleged act of bankruptcy was committed in respect of a partnership debt, and the petitioning creditor is a creditor of the firm, debtor cannot be adjudged a bankrupt in his individual capacity. Demurrer overruled, adjudication granted and a warrant issued to the messenger directing him to seize the separate estate as well as the estate of the firm in the hands of the bankrupt.—*In re* R. Stevens, 112.

For the purposes of petitioning, a partnership is to be held to subsist so long as there are outstanding debts against the firm or assets undistributed belonging to it.—*Hunt, Tillinghast & Co.* v. *Pooke & Steere*, 161.

An assignee of a bankrupt firm takes by his assignment all the property of the firm and of the individual members thereof, even though part of the property may be out of the district in which the bankrupts reside, and owned in part by partners who have not been joined in the bankruptcy proceedings.—*In re* Warren Leland and Charles Leland, 222.

A discharge properly granted to the individual members of a firm will be available in respect to any indebtedness of any other partnership in which they were interested, and for whose debts they might be liable. The creditors of the several partnerships are entitled to preference of payment out of the assets of the firm to which they respectively gave credit.—*Id.*

While proceedings are pending in one district, it is improper to grant an adjudication in another, as the petition first filed takes the precedence.—*Id.*

Where the original consideration of a claim passed to a partnership, but the obligations given for the same were executed by the individual members of the firm as such, *Held*, that the creditors holding such obligations are entitled to a credit out of the individual estates.—*In re* Bucyrus Machine Co. 303.

An agreement to sell an individual certain specific articles expressly for his individual use and consumption, to be paid for out of the partnership goods of the firm, is void as to the other partners. Such an arrangement, made without the knowledge, assent or approval of his copartners, is therefore fraudulent and void as to them.—*Taylor* v. *Rasch & Bernart*, 399.

A demurrer to a bill in equity brought by the assignee, on the ground that complainant has a complete remedy at law, will be overruled where the facts show that questions of fraud, trust and partnership are all involved in the case at issue.—*Id.*

Where a partner retired from a firm, but permitted his name to remain for the benefit of the other partners, he was held liable to persons who brought the note of the new firm in ignorance of the dissolution, and in reliance, in part, on his name.—*In re* Krueger *et al.* 439.

A notice in the newspaper not read by the person dealing with the new firm, *Held*, not to affect him with notice of the dissolution of partnership, though he had not been a customer of the old firm, in a case where the new firm had the right to use the old style in which the name of the retiring partner appeared.—*Id.*

See JOINT LIABILITY.

PARTIES.—See DISMISSAL OF PETITION, FRAUDULENT CONVEYANCE.

PARTNERS.—See DIFFERENT DISTRICTS.

PAYMENT.—See JURISDICTION, PURCHASE OF CLAIMS.

PETITION.

The debtor, on voluntary petition, was adjudged a bankrupt on the seventeenth of February, eighteen hundred and sixty-eight, but neglected to make application for final discharge, until the third of May, eighteen hundred and sixty-nine. It appearing to the court that no assets had come to the hands of the assignee, and that the application for discharge was not made within one year from the date of adjudication, his discharge was refused. The debtor afterwards filed a new petition in bankruptcy and was adjudged a bankrupt, and on motion of the creditors to vacate the adjudication and strike the petition from the file, *Held*, that the refusal of the court to grant a discharge upon that ground, was no bar to the new proceedings.—*In re* Farrell, 125.

PLEADINGS.—See SPECIFICATIONS.

PREFERENCE.

Where the debtor was a merchant and judgments had been recovered against him, executions thereon issued and levy made on his stock of goods, conceded valid liens, an endorser for the insolvent, whose liability had become fixed by the protest of two several notes, purchased the entire stock of goods, giving as part payment his two checks, (which were duly

paid,) the one to pay the sheriff for the amount of the levy and conceded value, and the other to cover his liability as endorser on notes then due and to become due, the amount of such purchase being the full value of the stock and more than could have been realized at a forced sale, it being agreed the purchaser should account for and pay over to the insolvent the surplus arising from the sale to an amount larger than that included in the checks. In March, eighteen hundred and sixty-nine, bankruptcy proceedings were commenced against the insolvent, alleging a fraudulent preference, &c., and an adjudication followed. The assignee brings his action to recover the value of the goods, and for a decree that the purchaser be prohibited from filing claims against the bankrupt's estate, or even being entitled to a dividend in the moneys advanced by him to pay the lien admitted valid. *Held*, that as it was evident that there was an intent to secure a preference, but even if no such intent existed it must be held that the transfer was in fraud of the bankrupt law, and must be set aside on that ground, and the endorser taking the transfer held to account. That the bankrupt law has provided the best mode of administering the estate of an insolvent, and will tolerate no attempt by individuals to devise and carry into effect some other plan inconsistent therewith, nor justify such an attempt by the excuse that they thought such plan wiser or better. That defendant must therefore account for all moneys in his possession, and that he must pay the market value of all the property he cannot deliver, with interest thereon from the time he sold or appropriated it to his own use from the date of the sale, and also must pay the amount of his collections, with interest since the demand.—*Cookinham et al* v. *Morgan et al.* 16.

The assignees of certain bankrupts brought a bill against one of their creditors alleging that he had seized and sold on execution, certain property, thereby receiving a preference, having reasonable cause to believe, at the time the leases were made, that the bankrupts were insolvent and that a fraudulent preference was intended. The evidence showed that bankrupts had failed some months before the filing of the petition against them, and that between the failure and the seizure of the property, bankrupts were making compromises, as their debts matured, at the rate of forty-five cents on the dollar, nothing appearing to show that this creditor had reasonable cause to believe that there were any creditors not compromised with, and over whom he could obtain a preference. Bill dismissed with costs.—*Warren and Rowe* v. *Tenth National Bank et al.* 479.

See CONFESSION OF JUDGMENT, MORTGAGE, REASONABLE CAUSE, RECOVERY OF PROPERTY.

PROOF OF DEBT.

Where the holder of a note receives part of the amount of the same from the endorser, he is entitled to prove for the whole amount against the estate of the bankrupt maker, and holds any surplus he may receive over and above the amount of the note in trust for the endorser. If the creditor omits to prove his debt, thus showing he looks to the endorser alone for payment, the endorser is entitled to come in and prove the note against the bank-

rupt's estate, and receive dividends upon its whole amount.—*In re* Ellerhorst & Co. 144.

Debts proved and filed with the register may be postponed for investigation, and not allowed to be voted upon in the opinion of an assignee. Efforts by the bankrupt's friends to compromise and buy up his debts, and stop proceedings in bankruptcy, are no fraud upon the bankrupt act, and are no reason why such debts should be postponed and not voted upon for the election of assignee.—*In re* Frank, 194.

Debts proved before election and sold and assigned after proof, must be voted upon by the actual owner and not by the original creditor, and the owner will be entitled to only one vote.—*Id.*

Where a party files separate proofs of debt for the same amount against the individual members of the firm, the claims must stand as proven, and the motion of the assignee that they be stricken from the list, will be overruled.—*In re* Beers *et al.* 211.

Where a creditor who has ample security for his claim makes proof of the same, without mentioning the security, through inadvertence and ignorance of the law, an order will be entered granting to the said creditor leave to withdraw his proof and restoring him to his rights as though no proof had been filed.—*In re* Clark & Bininger, 255.

See FRAUDULENT PREFERENCE.

PURCHASE OF CLAIMS.

Where nearly all the debts against a bankrupt copartnership, composed of three copartners, have been purchased in the interest of two of the copartners, by two of their friends, to whom the money for such purchase was furnished by those partners, the third partner not contributing, objects to the proof of the purchased claims as illegal, although it is not denied but that they were originally *bona fide* claims against the copartnership, *Held*, that a decree will be entered providing for the payment in full, by the assignees, of the unpaid and unpurchased proved debts, with interest: for the payment into court of the amount of the unpaid unproved debts, with interest; for the payment of the commission of the assignees, and the charges, fees, disbursements and expenses of their attorney and counsel, and the fees of the register and clerk; for the payment to the two purchasers (friends of two of the bankrupts) of the amount paid out by them in the purchase of the copartnership debts, together with interest; for the transfer of the remainder of the estate by the assignee to the bankrupts jointly by proper instruments.—*In re* Lathrop *et al.* 43.

RAILROAD.—See CORPORATION, RECEIVERS.

REASONABLE CAUSE.

If an insolvent gives a mortgage to a creditor who has reasonable cause to believe him insolvent, the fraud upon the bankrupt act is complete as to both. The question as to the creditor is whether he "had reasonable cause to believe" the debtor insolvent—not what he *did* believe; the lat-

ter is immaterial. The creditor is not constituted the sole judge of the sufficiency of the evidence of his debtor's insolvency, that is for the court to determine, the security being attacked.—*Hall* v. *Wager & Files*, 182.

Where a debtor had, during two years, paid off only a small portion of an overdue debt, had sold out the stock of goods for which the account was made, and transferred a part of the paper received therefor; had applied for extensions and been refused; had previously declined to execute a mortgage on the ground that it would injure his credit, and had been pressed by his different creditors, these facts constitute reasonable cause for belief of insolvency, and the creditor cannot escape from the consequences of knowledge of them.—*Id.*

It is not error to direct the attention of the jury to the distinction between "reasonable cause to believe," and "actual belief."—*Lawrence* v. *Graves*, 279.

A creditor who has reasonable cause to believe his debtor insolvent, and who receives payment of his debt or security, necessarily knows or has reasonable cause to believe that he is thereby obtaining a preference which is forbidden by law; but persons other than creditors dealing with an insolvent, even if they have reasonable cause to believe him insolvent, are not on the same footing, inasmuch as they do not necessarily enable the debtor to contravene the act, or defeat any of its requirements.—*Darby's Trustees* v. *Lucas*, 437.

See INSOLVENCY.

RECEIVERS.

The United States district court in bankruptcy will not interfere with the possession of receivers appointed by the state courts to take charge of the property of a railroad, until their title is impeached for some cause for which it is impeachable under the bankrupt act; nor is it for the bankruptcy court, before such title is thus impeached, to interfere with the management or control of such railroads and other property by such state courts or by such receivers under the orders of such state courts. Injunction heretofore granted in this case so far modified as to allow the receivers to enter upon the discharge of their duties and give the security required by the state court.—*Alden* v. *The Boston, Hartford & Erie R. R. Co.* 230.

RECOVERY OF PROPERTY.

A demurrer to the petition of the bankrupt's assignee to recover property fraudulently conveyed by one who claims the property by virtue of a voluntary assignment of the debtor, will not be sustained simply on the ground that more than two years have elapsed since the cause of action accrued, and that therefore, it is barred by section two of the present bankrupt act. Respondent required to pay the costs of the demurrer, and allowed time to put in answer to the assignee's petition.—*In re* Krogman, 116.

Where a creditor takes an unlawful preference by executions and seizes the bankrupt's property, the assignee is entitled to recover from the creditor

such property or its value, and in the accounting the creditor is only to be allowed credit for the actual expenses of sale which does not include the sheriff's fees.—*Sedgwick* v. *Millward*, 347.

A transfer which is only the execution of a contract made when there was no circumstances to impeach it as an intended fraud on the bankrupt law, and when the parties were acting in good faith, and long before anything occurred to throw a suspicion over the solvency of the debtor, will be protected, and a bill brought by the assignee in bankruptcy to recover personal property conveyed under the above state of facts will be dismissed.—*In re* Wood, 421.

RECOVERY OF REAL ESTATE.—See FRAUDULENT CONVEYANCE.

REGISTER.—See COUNSEL FEES, DEPOSITION.

RENT.

A landlord has a lien in the state of South Carolina on the personal property of the tenant, which is good for one year as against execution and other creditors. Under the Statute of Anne, a landlord has a secured lien for his rent in the state of South Carolina, and that law is still in force, not having been repealed by the military order of General Sickles. An assignee in bankruptcy is bound to respect the landlord's lien for rent.—*In re* Trim, *ex parte* Marshal; *Purcell et al.* v. *Wagner et al.* 23.

Upon the application of a landlord for an allowance for rent for the time during which his premises were occupied by the goods of the bankrupt while in the hands of the marshal, the court held that the landlord ought to have applied to the court for possession, immediately after the marshal took control, and that it would have ordered a removal of the goods and furniture therefrom and the premises vacated. If the landlord had an opportunity to rent the premises, he should have so represented to the court. Application for payment of rent refused.—*In re* McGrath & Hunt, 254.

SALE OF PROPERTY.

A register may be appointed by the bankruptcy court a special custodian of property advertised for sale under a mortgage, and be directed to sell the same under General Orders xix and xxi, with authority to make other advertisement than is required by the rules of the court. The order should designate the place where the moneys (proceeds of the sale) shall be deposited, as a separate fund subject to the further order of the court. The register will be directed to make the deed to the purchaser, and convey title under the order of the court free from certain liens in pursuance to section twenty of the act, and the lien of the mortgage will be transferred from the property so sold to the proceeds of the sale. If advisable in order to obtain a better price for the property, injunctions already granted may be modified so that a sale may be had under a judgment, and the referee may make out the deed.—*In re* Hanna, 292.

SALE OF REAL ESTATE.

The United States district court does not possess the power under the twenty-fifth section of the present bankrupt act, to order in a summary way the sale of an estate, real or personal, although the same is claimed by the assignee, even though the title to the same is in dispute, if it also appears that the estate in question is in the actual possession of a third person holding the same as owner, and claiming absolute title to and dominion over the same as his own property, whether derived from the debtor before he was adjudged bankrupt or from some former owner.—*Knight* v. *Cheney*, 305.

SPECIFICATIONS.

It is not necessary to state in specifications that the persons named to whom fraudulent payments are stated to have been made, were creditors of the bankrupt.—*In re* Smith & Bickford, 20.

The strictness of common law pleading is not required in creditors' specifications, but the bankrupt is entitled to such particularity of statement as will give him reasonable notice of what is expected to be proven against him.—*Id.*

SUFFERING PROPERTY TO BE TAKEN.

Where the debtor, when insolvent, suffered his property to be taken on legal process on behalf of creditors with the intent to give them preference, and they had at the time reasonable cause to believe that he was insolvent and that the transaction was in fraud of the provisions of the bankrupt act, and the transaction took place within four months before the filing of the petition in bankruptcy, it was a fraud on the act for the debtor to give or for the creditor to accept of the preference with the intent to prefer.—*Kohlsaat* v. *Hoguet*, 159.

The insolvency, the intent to prefer and the doing or suffering the thing which works the preference, are the elements on the part of the debtor. The elements on the part of the creditor are the receiving or being benefited by such thing, the having reasonable cause to believe the debtor insolvent, and the having reasonable cause to believe that a preference is intended. These six elements must co-exist, but nothing else is necessary to make the transaction void, if challenged by the assignee in bankruptcy in due time.—*Id.*

SURRENDER.—See FRAUDULENT PREFERENCE.

SUSPENSION OF PAYMENT.—See CORPORATION.

TRANSFER OF PROPERTY.

If a father-in-law, when his son-in-law is known by him to be insolvent, and within a few days of his voluntary application to be adjudged a bankrupt, buys, out of the usual course of trade, a large portion of the insolvent's

property, and gives notes payable at long dates, cashes the notes, and pays to his own son as mortgagee the money thus furnished, in discharge of a mortgage on the property of his daughter, who is the wife of the bankrupt son-in-law, that is certainly a transfer of the bankrupt's property to his wife in fraud of his creditors through the agency of his wife's father, and therefore fraudulent and void.—*Lawrence* v. *Graves*, 279.

VOTE.—See PROOF OF DEBT.

WARRANT.—See CONFESSION OF JUDGMENT.

WIDOW.

The widow of a bankrupt, whose petition in bankruptcy was filed after the act passed by the legislature of North Carolina, repealing the statutory provision and restoring the common law right of dower, the bankrupt dying after the issuing of the warrant in bankruptcy, is entitled to dower in the land owned by the bankrupt at the time of the filing of his petition. The act referred to repealed the statutory provision in regard to dower, which in effect restored *eo instanti* the common law. The legislature by that act attempted to create additional exemptions to those theretofore allowed by law; those exemptions are void as to creditors whose debts were contracted previous to the passage of the act.—*In re* Hester, 285.

The widow of a bankrupt is not entitled to the personal property exempted by the provisions of the fourteenth section of the act of eighteen hundred and sixty-seven, nor is the assignee in bankruptcy. No title to exempt property passes to the assignee by the assignment; it remains in the bankrupt; at his death it passes to his legal representatives.—*Id.*

WIFE.

The bankrupt's wife may prove as a creditor against his estate in bankruptcy, for money realized by him out of property which she held as her separate estate under the statutes of Massachusetts, if the evidence clearly shows that the transaction was intended to be a loan and not a gift.—*In re* Blandin, 39.

A husband may make a settlement of property on his wife, when he is solvent, and pecuniarily in a condition to make such a gift, if it is not unreasonable in amount, and if after making it he still has abundant assets to pay those debts which he owed at that time.—*Sedgwick* v. *Place et al.* 168.

See FRAUDULENT CONVEYANCE.

WRIT OF ATTACHMENT.—See EXEMPT PROPERTY.

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